

No. 2400

**In the United States Circuit Court
of Appeals**

NINTH CIRCUIT

October Term, 1913

Oregon and California Railroad
Company, et al.,

Defendants and Appellants

John L. Snyder, et. al.,

Cross-Complainants and Appellants

William F. Slaughter, et al.,

Interveners and Appellants

v.

The United States

Appellee

Appeal from the District Court of the United States for Oregon

Brief for the United States

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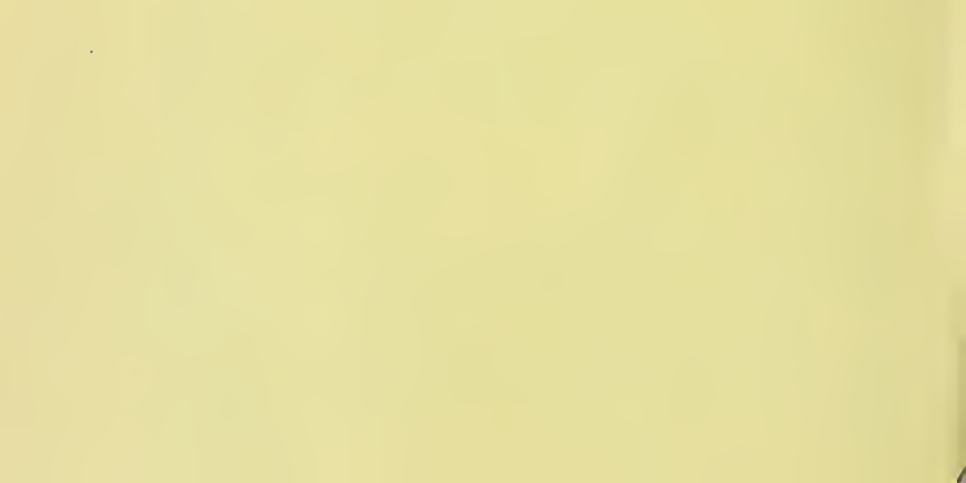
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No. 2400

IN THE UNITED STATES CIRCUIT
COURT OF APPEALS
NINTH CIRCUIT

October Term, 1913

OREGON AND CALIFORNIA RAIL-
ROAD COMPANY, ET AL.,

Defendants and Appellants,

JOHN L. SNYDER, ET AL.,

Cross-Complainants and Appellants,

WILLIAM F. SLAUGHTER, ET AL.,

Interveners and Appellants,

v.

THE UNITED STATES,

Appellee.

APPEAL FROM THE DISTRICT COURT OF
THE UNITED STATES FOR OREGON.

Brief for the United States

ORDER—This brief is arranged under two chief heads: The Statement of the Case, which embraces (a) an outline of the pleadings, orders of court and the decree, (b) the established facts and (c) the dis-

FOREWORD

puted facts; The Argument, which is divided into seven principal parts, subdivided into appropriate topics. The scheme of the brief, setting forth each subject considered, is exposed in the index (Ante. p. I).

STATEMENT OF THE CASE.

FOREWORD.

This is an appeal from a decision of the United States District Court for Oregon. The suit was brought in equity by the United States under the joint resolution of Congress approved April 30, 1908, to have it judicially determined that about 2,300,000 acres of granted lands, in Oregon, had been forfeited by the grantees, and their successors, through breaches of certain conditions subsequent in the grant under which they had received the lands from the Government.

The defendant Oregon and California Railroad Company is an Oregon corporation and claims to be the absolute owner of the lands in dispute. The defendant Southern Pacific Company is a Kentucky corporation; it owns all of the stock, guarantees \$17,745,000 outstanding bonds, and leases and operates the railroad and telegraph line of the Oregon and California Railroad Company. The defendant, Stephen T. Gage, is a resident and citizen of California, and is the surviving trustee in a deed of trust securing the preferred stock of the Oregon and

FOREWORD

California Railroad Company. And the defendant Union Trust Company, a New York corporation, is the trustee under a mortgage given by the Oregon and California Railroad Company to secure the \$17,745,000 of bonds just referred to.

The cross-complainants claim to be actual settlers upon some of the land in question and to have thereby acquired some right to the lands settled upon.

The interveners assert that they have offered to comply with all the conditions necessary to entitle them to certain of said lands and in consequence have a claim thereto.

It was stipulated that but one cross-complaint and one petition in intervention should be printed in the record and that each should be treated as typical of all others of its class. (Stip. Vol. XVI 8655.)

Vols. I-III, inclusive, of the printed record contain the pleadings, rulings of the court and the decree; Vols. IV-XIV, inclusive, the stipulation of fact, testimony offered in chief by complainant, testimony offered in chief by defendants, except Exhibit 399, and testimony offered by complainant in rebuttal; Vols. XV-XVI, inclusive, defendants' Exhibit 399, certain other exhibits, assignments of error, bond, citation and other papers with reference to the appeal; Vol. XVII, an index of the record, and Vol. XVIII, defendants' photographic exhibits.

THE BILL SUMMARIZED.

After stating the names of the defendants, their residences and citizenship, the bill proceeds in substance as follows:

On July 25, 1866, Congress passed an act

granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, in Oregon.

The act is set out in the bill. We give the substance of such parts as we deem pertinent at this time.

Sec. 1. The California and Oregon Railroad Company, a California corporation, and

Such company organized under the laws of Oregon as the Legislature of said state shall hereafter designate.

are authorized and empowered to locate, construct and maintain a railroad and telegraph line between the City of Portland, Oregon, and the Central Pacific Railroad in California; the California and Oregon Company to construct that part of the road and telegraph line within the State of California and the Oregon Company to construct that part of it within the State of Oregon.

THE BILL SUMMARIZED

Sec. 2. Grants certain lands in Oregon and California to aid in the construction of the railroad and telegraph line between the points named.

Sec. 3. Gives the right of way over the public lands.

Sec. 4. Provides that whenever the said companies, or either of them, shall have 20 miles of road and telegraph line ready for service, the President shall appoint three commissioners to examine the same, and if it shall appear that 20 consecutive miles have been completed and equipped, the commissioners shall so report to the President and thereupon patents shall issue to the companies for the lands earned.

Sec. 5. The grant is made upon condition that the companies shall keep the railroad and telegraph in repair and use, and shall transport the mails and transmit dispatches for the Government when required at fair and reasonable rates; also that all property or troops of the United States shall be transported at the cost of the corporations, when required by the Government.

Sec. 6. Provides:

That the said companies shall file their assent to this act in the Department of the Interior within one year after the passage hereof, and shall complete the first section of twenty

THE BILL SUMMARIZED

miles of said railroad and telegraph within two years, and at least twenty miles in each year thereafter, and the whole on or before the first day of July, one thousand eight hundred and seventy-five.

Sec. 8:

That in case the said companies shall fail to comply with the terms and conditions required, namely, by not filing their assent thereto as provided in section six of this act, or by not completing the same as provided in said section, this act shall be null and void, and all the lands not conveyed by patent to said company or companies, as the case may be * * * shall revert to the United States.

Sec. 10. That all mineral lands are excepted from the operation of the act, save where they contain timber; in such case the timber may be removed to aid in the construction of the road.

Sec. 12:

That Congress may at any time, having due regard for the rights of said Oregon and California Railroad companies, add to, alter, repeal or amend this act.

On October 6, 1866, the bill says certain persons organized, under the laws of Oregon, a corporation

THE BILL SUMMARIZED

bearing the name "Oregon Central Railroad Company," with its principal place of business at Portland, and two days later the Legislature of Oregon designated it as the corporation entitled to receive the grant. Soon thereafter this company, for the purpose of availing itself of the grant, projected a line from Portland in a westerly direction to Forest Grove and thence southerly to McMinnville on the westerly side of the Willamette River, from which circumstance it became known as the "West Side Company" and its projected road as the "West Side Road," and they are so referred to throughout the bill.

May 25, 1867, it is averred the company adopted a resolution assenting to the provisions of the act of Congress, and on July 6 of the same year filed the assent, together with a copy of its articles of incorporation and of the resolution of designation by the Legislature in the office of the Secretary of the Interior, and on August 20, 1868, filed in the same office a general map of survey of its proposed line of road.

In April, 1867, it is alleged, certain residents of Oregon, contending that the West Side Company had never been lawfully incorporated, and designing to secure the benefits of the Congressional grant, attempted to organize, under the laws of Oregon, another corporation bearing the name "Oregon Cen-

THE BILL SUMMARIZED

tral Railroad Company," with its principal place of business at *Salem*, Oregon. This company projected its line of road on the easterly side of the Willamette River, and became known as the "East Side Company," and its road as the "East Side Road" to distinguish it from the other company of the same name, whose line, as we have just seen, was projected on the west side of the Willamette River.

The West Side Company, it is charged, having failed to finish its first 20 miles within the time provided by the act of 1866, applied to Congress for an extension of time and, on July 25, 1868, Congress granted it by amending section six of the act so as to give the company eighteen months from the passage of the new act for the completion of the first 20 miles and enlarging the time for finishing the road from 1875 to 1880.

The bill then says that the East Side Company, in furtherance of its promoters' design, on October 20, 1868, procured the adoption of a resolution by the Legislature of Oregon, which, in substance, substituted the East Side Company for the West Side Company. Thereupon a controversy arose between the two companies as to which was entitled to the grant. The East Side Company, realizing that the year had expired within which assent to the provisions of the act of 1866 must be filed, applied to Congress in 1868 for an extension of time and simul-

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taneously laid before Congress the joint resolution of the Legislature of Oregon designating it as the corporation to receive the grant, and averred that if the time for filing the assent was not extended the benefits of the grant would be wholly lost to the State of Oregon.

The West Side Company, it is asserted, opposed the application and contended that the grant had become vested in it. Congress granted an extension by passing the amendatory act of April 10, 1869, which amended section six of the act of 1866, and said among other things:

And provided further, that the lands granted by the act aforesaid shall be sold to *actual* settlers only, in quantities *not* greater than *one-quarter* section to *one* purchaser, and for a price *not* exceeding *two dollars and fifty cents* per acre.

The East Side Company, through its directors, on June 8, 1869, adopted a resolution which, after reciting that it had been designated by the Legislature of Oregon to receive the grant, declared that it accepted

all the provisions, rights, privileges and franchises of said act of July 25, A. D. 1866,
* * * and of *all* acts *amendatory* thereof, and upon the conditions therein specified, and do

THE BILL SUMMARIZED

hereby give our assent and the assent of such company thereto.

The company filed a copy of this resolution in the office of the Secretary of the Interior June 30, 1869, and in October of the same year filed in the same office a map of survey and location of 70 miles of its projected line.

It is further averred that the right of the East Side Company to use the name "Oregon Central Railroad Company" having become involved in litigation, the stockholders of that company in March, 1870, organized the defendant Oregon and California Railroad Company, under the laws of Oregon, and in the articles of incorporation stated that the principal object of the corporation was to become the successor of the East Side Company, and to receive and exercise the grants, franchises and privileges given by the act of 1866 and the acts *amendatory* thereof. Accordingly on March 29, 1870, the East Side Company executed and delivered to the Oregon and California Railroad Company an instrument, purporting to assign, transfer and convey to it all the property of the East Side Company, including its right to the grant made by the act of July 25, 1866, and acts *amendatory* thereof. The bill charges that the purpose and intent of this instrument was not to operate as a sale of the lands granted, but to constitute the Oregon and California

THE BILL SUMMARIZED

Railroad Company the successor of the East Side Company.

In April of the same year the East Side Company was dissolved, and the Oregon and California Railroad Company, through its board of directors, adopted a resolution declaring:

That this company do accept the grant conferred by such act of Congress (meaning the act of 1866), and all the benefits and emoluments therein or thereof granted, and upon the terms and conditions therein specified.

And directing the president and secretary

to file the assent of this company to such Act of Congress and *amendments* thereto, as aforesaid, in the office of the Secretary of the Interior.

It also directed that the same officers should file in the same office a copy of the deed of assignment just mentioned. The assent, resolution and deed were filed as directed on the 28th day of the same month.

The bill then alleges that the West Side Company failed to complete construction of any part of its line, abandoned all claim to the grant of 1866, acquiesced in the substitution of the East Side Company, and applied to Congress for another grant in lieu of the one abandoned. In response to this Con-

THE BILL SUMMARIZED

gress passed the act of May 4, 1870, granting certain lands to the West Side Company,

for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamhill River, near McMinnville, in the State of Oregon.

This act has in it provisions similar to the one of 1866, requiring the filing of an assent with the Secretary of the Interior within one year from the time of its passage, and provided that the lands granted

Shall be sold by the company only to *actual* settlers, in quantities *not* exceeding *one hundred and sixty* acres or a quarter section to any *one* settler, and at prices *not* exceeding *two dollars and fifty cents* per acre.

The West Side Company filed its assent to this act on July 20, 1870.

In that year the owners of a majority of the stock of the Oregon and California Railroad Company purchased all the stock of the West Side Company and thereafter the two companies were conducted as one until the West Side Company was dissolved in 1880.

THE BILL SUMMARIZED.

The bill then recites the progress of the work on both lines and the financial difficulties of the companies during the next decade. It is stated in this connection that the Oregon and California Railroad Company, between 1870 and 1873, constructed 197 miles and the West Side Company 47 miles of their respective roads. Work was then suspended, not to be resumed on the East Side line until 1881, and never on the West Side line.

It is then averred that in 1881 all of the former stock of the Oregon and California Railroad Company was cancelled, because nothing had ever been paid for it, and new stock was issued in the sum of \$19,000,000; \$12,000,000 preferred and \$7,000,000 common; that this stock is still outstanding; that it was used to pay in part the existing indebtedness of the company; that in June, 1881, the company delivered to certain trustees an instrument in writing purporting to convey to them the lands of both grants as security for payment of the *preferred* stock; that this trust deed purports to authorize the trustees and their successors to sell and convey the lands covered by it in violation of the terms of the grant; and that afterwards Stephen T. Gage became the sole trustee under this deed.

The bill further alleges that two issues of bonds were negotiated, one on June 1, 1881, and another on May 26, 1883, known as "First Mortgage Bonds"

THE BILL SUMMARIZED

and "Second Mortgage Bonds," respectively; that through these bonds the Oregon and California Railroad Company procured funds aggregating \$5,000,000 and at once resumed the work of construction on the East Side line and continued until 1884, when its funds having become again exhausted the construction was abandoned and not resumed until 1887.

It is stated that default having occurred in the payment of interest on the aforementioned bonds, suit was brought in the United States Court for Oregon and the property of the company placed in the hands of a receiver; that in May, 1887, during the pendency of the receivership, the Southern Pacific Company acquired control of the Oregon and California Railroad Company; and the many transactions through which this was accomplished are set out in detail.

It is charged that in 1887 the Southern Pacific Company leased from the Oregon and California Railroad Company its road and telegraph lines, and other property, for a term of 40 years; that this lease remained in effect until about 1893, when a new lease was made for a term of 34 years, which is still in force; and that pursuant to this lease the Southern Pacific Company has operated the railroad and telegraph lines ever since; it is also stated,

THE BILL SUMMARIZED

in this regard, that in 1901 the Southern Pacific Company became the owner of all the capital stock of the Oregon and California Railroad Company and is now, and ever since has been, the owner thereof; that through this ownership it has controlled, and still controls, the management of that company.

The bill further avers that after the Southern Pacific Company secured control of the Oregon and California Railroad Company it, on July 1, 1887, caused the latter company to make and deliver to the Union Trust Company a trust deed covering substantially all its property, including the land grants, to secure bonds in the sum of \$20,000,000 to be subsequently issued; that these bonds were issued, were guaranteed by the Southern Pacific Company, and their sale negotiated and consummated by that company; that the proceeds of these bonds came under the control of the Southern Pacific Company and were used by it to purchase securities of the Oregon and California Railroad Company to complete the construction of the latter company's road and, in consequence, the bonds represent an indebtedness of the Southern Pacific Company; that the deed to the Union Trust Company, just mentioned, purports to authorize that company, and its successors, to sell and convey the lands described therein in violation of the terms of the grants.

THE BILL SUMMARIZED

It is then stated that the receivership proceedings, heretofore referred to, were dismissed in June, 1888, and the first and second mortgage bonds, excepting those secured by the trust deed of July 1 to the Union Trust Company, together with all mortgages and trust deeds securing them, were discharged.

The bill also alleges that the Southern Pacific Company, through its land department, in 1888 took control of the sale of the granted lands; that a large force of timber cruisers and land examiners were sent out to examine and appraise the lands; that the prices as to at least eighty per cent thereof were fixed at a sum greatly in excess of \$2.50 per acre; and that for the purpose of evading responsibility for the contemplated violation of the terms of the grant the Southern Pacific Company, Oregon and California Railroad Company and Union Trust Company adopted a form of quit-claim contract and conveyance instead of the forms embodying warranties which had been used theretofore.

It is alleged that the issuance of patents commenced in 1871 and continued until 1877; during which period 323,148.68 acres were patented; that the issuance of patents was then suspended and not resumed until after the Southern Pacific Company had acquired control. But thereafter patents were rapidly applied for. Between 1893 and 1906, 2,-

THE BILL SUMMARIZED

442,448.45 acres were patented, making a total of 2,765,597.13 acres patented under the East Side grant, and that in addition to the patented lands, the Oregon and California Railroad Company claims title to about 293,000 acres unpatented; that under the act of May 4, 1870, no patents were issued until 1895; and that between that year and 1903, 128,618.13 acres were patented under that grant, making a total of 2,894,215.26 acres patented under both grants; which, with the unpatented lands, aggregate 3,187,215.26 acres.

The bill says that all patents were issued to the Oregon and California Railroad Company *as the successor* of the East Side Company *and* the West Side Company, respectively; and that no patents have been issued since 1906 under either grant, for reasons stated therein; it is further averred, in this connection, that all patents were issued by the Department of the Interior upon applications in writing of the Oregon and California Railroad Company, accompanied by affidavits, sworn to by duly authorized agent of that company, to the effect that all lands for which patents were asked were of the character contemplated by the grant under which they were claimed; and that the department officials, relying on these affidavits issued the patents.

It is then alleged that the Southern Pacific Company, between 1894 and 1903, developed a lively demand among wealthy land speculators and timber

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men for large quantities of land; that during that period the lands were disposed of without any regard for the terms of the grants; that they were sold in parcels of from 1000 to 45,000 acres to a single purchaser and at prices ranging from \$5.00 to \$40.00 per acre; that most of the sales in violation of the terms of the grants were subsequent to 1897; and that the total sales amounted to 820,000 acres, classified thus:

	Sales.	Acres.
Sales in quanties not exceeding one		
quarter section	4,930	296,000
Sales in quanties exceeding one		
quarter section	376	524,000

It is charged that sales were suspended and all the land withdrawn from market in 1903; that approximately 640,000 acres have been conveyed and there are outstanding about 830 executory contracts, covering approximately 174,000 acres. It is then stated, on information and belief, that substantially all of these contracts were made between 1898 and 1903, and that the average price fixed therein is in the neighborhood of \$10.00 per acre; to the bill is attached a schedule marked J, setting forth all the conveyances made and contracts pending.

It is further averred that the Oregon and California Railroad Company has received for lands sold \$4,970,273.59 and in addition several hundred

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thousand dollars from the leasing of lands, sale of timber, and forfeitures of partially performed contracts of sale.

The bill alleges that the mortgage to the Union Trust Company has been treated by the parties thereto as a lien upon all the granted lands which remained unsold on May 12, 1887; that the Union Trust Company has joined in all conveyances of land since that time, has received substantially all the purchase money paid thereon and has applied the same on the \$20,000,000 indebtedness and thereby reduced it to \$17,500,000.

It is then asserted that close to 1,800,000 acres of the unsold lands are situated in the neighborhood of Eugene, Oregon, and constitute nearly one-half, in alternate sections, of all lands within approximately 40 miles of the railroad from Eugene to the southern boundary line of Oregon; that this territory is wholly dependent for railroad transportation upon the lines of the Oregon and California Railroad Company, operated by the Southern Pacific Company; that since 1903 well nigh 1000 persons have severally applied to the railroad company to purchase the unsold lands in quantities and at prices within the terms of the grants; that these persons desired to become actual settlers and establish their homes thereon; that in addition to these a large number of persons are ready and willing to pur-

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chase the lands within the terms prescribed by the grants, but that notwithstanding all this the railroad company withdrew all the lands from sale in January, 1903, and has ever since refused, and still refuses, to sell any thereof to actual settlers, and besides has resorted to divers means to discourage and obstruct the actual settlement of the lands within the terms of the grant; that this policy has prevented the development of the territory just described, has thwarted the establishment of competing railroads therein and has given, in effect, a monopoly of the land and transportation thereof to the Southern Pacific Company.

It is also charged that the present existence of the Oregon and California Railroad Company is a mere pretense, because the Southern Pacific Company, through its stock ownership and otherwise, controls it absolutely, originates its policy, and is in all respects responsible for its conduct; then follows the allegation, that ever since 1903 the Oregon and California Railroad Company, under the influence of the Southern Pacific Company, has assumed and now asserts an absolute and unconditional estate in all of the unsold lands, in violation of the terms of the grant; that these lands have not been reduced to possession or in any way improved, unless it be by persons claiming to have settled thereon; that the reasonable value thereof exceeds the sum of \$40,000,000; that none of the unsold lands are, or ever

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were, necessary for depots, stations, sidetracks, woodsheds, or any other needful purpose in operating the railroad, nor are they reserved or intended for any such purpose; and that the Oregon and California Railroad Company has repeatedly threatened to do acts impairing the title to the lands, to commit waste upon the lands, and will do so unless restrained.

Then follows the statement that prior to 1894 there was substantially no demand for the lands, except for the purpose of settlement; that during this period the Oregon and California Railroad Company maintained an immigration bureau to induce settlement; that in view of this, occasional violations of the terms of the grant were generally unknown; that since 1894 nearly all of the sales were by executory contracts and were not placed of record, and did not merge into deeds until many years thereafter; that a considerable number of these contracts are still outstanding, as heretofore stated, and that many of the conveyances were not placed upon record until recently and some are still unrecorded; that when the lands were withdrawn in 1903 the reason for doing so was concealed and the railroad company from time to time falsely represented that they had been withdrawn for temporary purposes only.

It is further averred that the Legislature of the State of Oregon, about February 14, 1907, in re-

THE BILL SUMMARIZED

sponse to repeated demands of the people, adopted and communicated to the Government a memorial (Exhibit L), pointing out the violations of the grants and charging in general terms the true facts in the premises; that thereupon the further issuance of patents was suspended and an investigation of the subject instituted by the Attorney-General; that this investigation was concluded in January, 1908, and the result was soon thereafter brought to the attention of Congress, which, on April 30, 1908, adopted the following joint resolution:

That the Attorney-General of the United States be, and he hereby is, authorized and directed to institute and prosecute any and all suits in equity, actions at law, and other proceedings which he may deem adequate and appropriate to enforce any and all rights and remedies of the United States of America in any manner arising or growing out of or pertaining to either or any of the following described acts of Congress, to-wit: 'An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, in Oregon,' approved July twenty-fifth, eighteen hundred and sixty-six, as amended by the acts approved June twenty-fifth, eighteen hundred and sixty-eight, and April tenth, eighteen hundred and sixty-nine; * * * Also 'An act

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granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon,' approved May fourth, eighteen hundred and seventy, including all rights and remedies in any manner relating to the lands, or any part thereof, granted by either or any of said acts; and in and by any and all such suits, actions, or proceedings, the Attorney-General shall, in such manner as he shall deem appropriate, assert all rights and remedies existing in favor of the United States, relating to the subject of such suits, actions, and proceedings, including the claim on behalf of the United States that the lands granted by each of said acts, respectively, or any part thereof, have been and are forfeited to the United States by reason of any breaches or violations of any of the terms or conditions of either or any of said acts which may be alleged and established in any such suits, actions, or proceedings; it not being intended hereby to determine the right of the United States to any such forfeiture or forfeitures, but it being intended to fully authorize the Attorney-General in and by such suits, actions, or proceedings to assert on behalf of the United States and the court or courts before which such suits, actions, or proceedings may be instituted or pending to entertain, consider, and

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adjudicate the claim and right of the United States to such forfeiture or forfeitures, and if found to enforce the same.”

The bill then states that, pursuant to the foregoing resolution, this suit was commenced.

It also avers that by reason of the foregoing breaches all the unsold lands have been forfeited; that neither of the defendants, or any one claiming through or under them, has any right therein, and that by virtue of the foregoing joint resolution the complainant asserts title to, and resumes the title of, the forfeited lands.

It then states that all the lands sold, in violation of the terms of the grants, were forfeited, but were not included in the suit for certain reasons stated in the bill.

It is alleged that the mortgage to the Union Trust Company of July 1, 1887, to secure the payment of the \$17,500,000 of outstanding bonds, covers enough of property outside of the granted lands to more than satisfy the indebtedness; and it is asserted that the Trust Company has no interest in the lands, either by reason of the mortgage, or otherwise.

Attached to the bill are certain schedules; the one marked M sets forth all maps of surveys and locations filed in the office of the Secretary of the

THE BILL SUMMARIZED

Interior, by the grantees, pursuant to the conditions of the grants; the one marked N shows the time of the construction of the several sections of the road and telegraph lines, together with the dates in which the sections were examined, approved and accepted by the Government Commissioners; and the one marked O sets forth the quantity of lands patented from time to time, under each grant, compiled by years.

It is said that the cross-complainants and interveners claim an interest in the lands as actual settlers; that for the purpose of enforcing their claims some had commenced separate suits in the Circuit Court of the United States for the District of Oregon and one in the United States Court for the Western District of Washington, before this suit was instituted; that if said suits had been permitted to proceed they would have hindered and substantially prejudiced the rights of the Government in this action and therefore complainant asks that they be enjoined from further prosecuting the suits, but be permitted, if so advised, to become parties to this suit, and set up therein their respective claims.

The bill prays that the patented and unpatented lands, remaining unsold, be declared forfeited; that the title thereto be quieted in the complainant against all defendants, and all persons claiming through or under the defendants; that the defend-

CROSS-COMPLAINTS SUMMARIZED

ants, and each of them, be required to surrender to the complainant full possession, if any they have, to the lands in question; that all the defendants be enjoined from in any manner asserting title to the unsold lands; and that the Oregon and California Railroad Company, Southern Pacific Company, and Union Trust Company be required to account for any moneys received from or on account of the lands, and for general relief.

CROSS-COMPLAINTS.

Each of the cross-complainants alleges that he had, prior to the institution of the suit, actually settled upon a quarter section of the land described in the grants for the *bona fide* purpose of making his home thereon and of purchasing the land from the Oregon and California Railroad Company at the price of \$2.50 per acre, and that he had made tender to that company of the purchase price.

He then alleges substantially the same facts as those stated in the bill; but denies that the lands sued for by him "are or can be forfeited to the United States"; and asserts that he is ready and willing to pay into court for the Oregon and California Railroad Company the sum of \$400.00, the purchase price of the lands settled upon, prays that it be decreed that the railroad company holds the lands settled upon by him in trust and that the com-

PETITIONS IN INTERVENTION SUMMARIZED

pany be compelled to accept the money tendered and convey to him the lands.

PETITIONS IN INTERVENTION.

The interveners admit substantially all the allegations of fact contained in the bill, but deny that the lands applied for by them are subject to forfeiture.

It is alleged by each intervener that a long time prior to the commencement of the suit he applied to the Oregon and California Railroad Company to purchase a quarter section of land and offered to pay therefor the sum of \$2.50 per acre, and made due tender of the money, but that the same was refused; that at the time he made application it was his intention to make actual settlement upon the land and so stated to the company; he offers to deposit in court, for the use and benefit of the company, the sum of \$400.00 to pay for a quarter section of land at \$2.50 per acre.

It is further alleged by each that Congress intended to create a trust in the granted lands for the use and benefit of such citizens of the United States as should become actual settlers thereon and offer to purchase the same in accordance with the terms and under the restrictions imposed by the grants; that the land is held in trust by the Oregon and California Railroad Company for his benefit and for the

DEMURRERS—ANSWER SUMMARIZED

benefit of others of his class and he asks that the company be required to convey to him the land which he has applied for on the payment of the price thereof.

DEMURRERS.

The defendants, Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as trustee, demurred to the bill of complaint, the cross-complaints and the petitions in intervention; and the defendant Union Trust Company separately demurred to the cross-complaint.

All of the demurrers were submitted together, the court overruled the demurrer to the bill and sustained the demurrers to the cross-complaints and petitions in intervention. (R. II-677-695.)

The defendants Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage filed a joint and several answer. The Union Trust Company answered separately. (R. III-1165.) The cross-complainants and interveners filed no further pleading.

ANSWER OF DEFENDANTS OREGON AND CALIFORNIA RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY AND STEPHEN T. GAGE.

The answer of the above named defendants admits substantially all the allegations of fact in the

THE ANSWER SUMMARIZED

bill, except as hereinafter stated and, therefore, no useful purpose would be served by detailing those admissions in this place.

Denials.

The answer denies that the East Side Company applied to Congress for an extension of time within which to file its assent to the act of July 25, 1866, or that it laid before Congress the joint resolution of the Legislature of Oregon and represented that the recitals therein were true; that the Oregon and California Railroad Company was organized by promoters or stockholders of the East Side Company; that the stock of the West Side Company was acquired by the owners of the Oregon and California Railroad Company; that the stock of both companies was at any time held by a single interest, or issued without consideration; that the West Side Company was dissolved in October, 1880; that the Oregon and California Company applied for any of the patents issued to it as the successor of the East Side Company, or that the Southern Pacific Company established a general land office for the disposition of lands of its constituent companies.

It denies that the applications of persons exceeding 1000 to purchase tracts of 160 acres were made in good faith, or that each applicant tendered \$2.50 for each acre at the time of making such application; that in addition a large number of persons had

THE ANSWER SUMMARIZED

settled upon the lands and offered to pay \$2.50 per acre; that it refused, or refuses, to sell any part of the unsold lands to actual settlers; that the lands have been converted to the use of the Southern Pacific Company and that a land monopoly has been maintained for the benefit of that company or that the industrial development of Oregon has been seriously retarded by reason of the Southern Pacific Company's refusal to sell the lands in question.

It further denies that the bill presents a suit of equitable cognizance.

It also denies that the conveyances made to the Oregon and California Company on October 6, 1880, by the West Side Company was for the purpose of merging the latter in the former company, and denies that Oregon and California Railroad Company thereby became the successor of the West Side Company.

It further denies that the Pacific Improvement Company was wholly owner or controlled by the owners of a majority of the stock of the Southern Pacific Company; that the latter company was the actual purchaser of the second mortgage bonds, or any part thereof, as alleged by the bill.

It denies that the Southern Pacific Company controlled the election of directors and officers of the Oregon and California Company, or influenced the corporate acts of the latter company; or that any of

THE ANSWER SUMMARIZED

the proceeds from the issue of the \$20,000,000 of bonds, secured by the mortgage to the Union Trust Company, was used by the Southern Pacific Company to purchase securities of the Oregon and California Company.

It also denies that no patent has been issued since 1906 under either of the grants, and says that Exhibit J, attached to the bill, is incorrect, but that Exhibit 4, attached to the answer, sets out correctly the matters referred to in Exhibit J.

ALLEGATIONS.

The answer *alleges* that construction of the East Side Company was commenced in the month of April, 1868, and that all the interests acquired by the East Side Company in the grant were free from the obligations of the amendatory act of 1869.

It avers that the lands not sold are essentially timbered lands, and are not susceptible of actual settlement; that only about 300,000 acres of all the lands granted are capable of actual settlement, and that nearly all of these lands have been sold to such settlers, in quantities of 160 acres, or less, and at prices not exceeding \$2.50 per acre.

It further alleges that it has paid \$1,827,234.10 in taxes, and sets forth what purports to be a statement of receipts and disbursements, on account of the lands, substantially as follows:

THE ANSWER SUMMARIZED

Receipts	\$5,506,199.22
Disbursements	3,242,777.00
	<hr/>
Profit	2,263,422.22

It asserts that for more than 40 years the Government had actual and constructive knowledge of the sales of land in quantities in excess of 160 acres to one person, other than an actual settler, and at prices in excess of \$2.50 per acre; that it had constructive knowledge of substantially all transactions by the defendants charged as unlawful and acquiesced therein and expressly approved and ratified some of them; that it issued patents for lands under the grants in question after diligent investigation by the proper officers of the Government; that it accepted and approved said railroads as constructed; that it has accepted free use of the railroads in the transportation of troops and munitions of war, and that the services thus rendered are worth \$1,000,000; that the Oregon and California Company relying upon said approval and acquiescence paid the taxes on the unsold lands to the amount of \$187,234.10, and made other expenditures amounting to the sum of \$145,977.26; and that no part of the money thus paid has been tendered back by the complainant; and it also alleges that, relying on said acceptance, approval and acquiescence, the Southern Pacific Company guaranteed the payment of said \$17,500,000 in bonds.

THE ANSWER SUMMARIZED

It further avers that this suit is barred by section 391 of Lord's Oregon Laws; section 8 of the act of Congress approved March 3, 1891, and by section 1 of the Act of Congress approved March 2, 1896; also that the complainant by reason of the passage of the Act of Congress approved January 1st, 1885, and the Act of September 29, 1890, has waived any right to claim a forfeiture.

It also alleges that persons claiming under the defendants have absolute title to the lands in question; that the Oregon and California Railroad Company is the owner of all the lands patented and unpatented, not heretofore sold, and denies that any of said lands is subject to forfeiture.

ANSWER OF THE DEFENDANT UNION TRUST COMPANY.

This answer is substantially the same as the answer of the other defendants with this addition: It alleges that by the Act of June 19, 1878, there was created in the Department of the Interior an Auditor of Railroad Accounts, to whom railroad companies west of the Missouri River, that had received land grants from the United States, should report in accordance with a system to be prescribed by him, and that by the act of March 3, 1881, the title of this officer was changed from Auditor of Railroad Accounts to Commissioner of Railroads.

THE ANSWER SUMMARIZED

In harmony with this law, it is alleged, the defendant Oregon and California Railroad Company made reports of its land sales each year, commencing in 1879 and continuing down to and including the year 1903. These reports show, so it is averred, that the company had sold land in quantities of more than 160 acres to one person, and at prices exceeding \$2.50 per acre. It is then stated that these reports were brought to the attention of the Secretary of the Interior who transmitted them to the President, and by the President were laid before Congress, where they were referred to the appropriate committee of each House and printed in House Executive Documents.

It is then stated that, notwithstanding the knowledge of the administrative officers of the Government and of Congress of the action of the Oregon and California Railroad Company in selling from the beginning lands in tracts greater than 160 acres to one person and at prices higher than \$2.50 per acre, complainant continued to issue patents to the company for the lands.

It is further averred that no executive officer ever challenged the correctness of the construction placed upon said act of Congress by the Oregon and California Railroad Company as shown by its said reports until the bill herein was filed in 1908.

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The act of August 20, 1912, is referred to and the claim is made that by its passage the United States waived all breaches of the terms of the grants.

It is then averred that by reason of the matters set out in the answer, the United States has waived all right to forfeiture of the lands and is estopped from asserting any claim thereto.

There is a formal replication to each answer.

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Stipulation.

Nearly all the controlling facts are covered by a stipulation (Stip. R. IV-1552).

Acts of Congress.

On July 25, 1866, Congress passed

An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, in Oregon.

The act provides:

Sec. 1. That the California and Oregon Railroad Company, a California corporation organized to connect Portland, Oregon, with Marysville, California, and

Such company organized under the laws of Oregon as the legislature of said State shall hereafter designate,

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are authorized and empowered to locate, construct and maintain a railroad and telegraph line between the city of Portland, Oregon, and the Central Pacific railroad in California. The California and Oregon Company is to construct the part of the road and telegraph line in California and the Oregon Company the part in Oregon. The company completing its part first is authorized to continue the work of construction, with the consent of the State in which the unfinished part lies, upon the terms granted in the act, until both parts meet and are connected.

Sec. 2. That there be, and hereby is, granted to the said companies, their successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the line of said railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in

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lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections; and as soon as the said companies, or either of them, shall file in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein granted on each side of said railroad, so far as located and within the limits before specified. The lands herein granted shall be applied to the building of said road within the States, respectively, wherein they are situated. And the sections and parts of sections of land which shall remain in the United States within the limits of the aforesaid grant shall not be sold for less than double the minimum price of public lands when sold: *Provided*, That bona fide and actual settlers under the preemption laws of the United States may, after due proof of settlement, improvement, and occupation, as now provided by law, purchase the same at the price fixed for said lands at the date of such settlement, improvement, and occupation: *And provided also*, That settlers under the provisions of the homestead

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act, who comply with the terms and requirements of said act, shall be entitled, within the limits of said grant, to patents for an amount not exceeding eighty acres of the land so reserved by the United States, anything in this act to the contrary notwithstanding.

Sec. 3. Gives from the public lands a right of way to the extent of 100 feet in width on each side of the road and all necessary grounds for stations, buildings, work shops, etc., and authorizes the taking from those lands of such earth, stone, timber and water as may be necessary for the construction of the road.

Sec. 4. That whenever the said companies, or either of them, shall have 20 miles of road and telegraph line ready for service, the President shall appoint three commissioners to examine the same; and if it shall appear that 20 consecutive miles have been completed and equipped, as required by the act, the commissioners shall so report to the President and thereupon patents shall issue to the companies, or either of them, for the lands granted to the extent and coterminous with the completed sections, and in this way, from time to time, whenever 20 or more consecutive miles of road and telegraph shall be completed and equipped, as aforesaid, patents shall issue until the entire road and telegraph line shall have been completed.

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Sec. 5. That the grants aforesaid are made upon the condition that the said companies shall keep said railroad and telegraph in repair and use, and shall at all times transport the mails upon said railroad, and transmit despatches by said telegraph line for the Government of the United States, when required so to do by any department thereof, and that the Government shall at all times have the preference in the use of said railroad and telegraph therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service. And said railroad shall be and remain a public highway for the use of the Government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the Government of the United States.

Sec. 6. That the said companies shall file their assent to this act in the Department of the Interior within one year after the passage hereof, and shall complete the first section of twenty miles of said railroad and telegraph within two years, and at least twenty miles in each year

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thereafter, and the whole on or before the first day of July, one thousand eight hundred and seventy-five; and the said railroad shall be of the same gauge as the "Central Pacific Railroad" of California, and be connected therewith.

Sec. 7. That the said companies named in this act are hereby required to operate and use the portions or parts of said railroad and telegraph mentioned in section one of this act for all purposes of transportation, travel, and communication, so far as the Government and public are concerned, as one connected and continuous line; and in such operation and use to afford and secure to each other equal advantages and facilities as to rates, time, and transportation, without any discrimination whatever, on pain of forfeiting the full amount of damage sustained on account of such discrimination, to be sued for and recovered in any court of the United States, or of any State, of competent jurisdiction.

"Sec. 8. That in case the said companies shall fail to comply with the terms and conditions required, namely, by not filing their assent thereto as provided in section six of this act, or by not completing the same as provided in said section, this act shall be null and void,

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and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, shall revert to the United States. And in case the said road and telegraph line shall not be kept in repair and fit for use, after the same shall have been completed, Congress may pass an act to put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the United States, to repay all expenditures caused by the default and neglect of said companies or either of them, as the case may be, or may fix pecuniary responsibility, not exceeding the value of the lands granted by this act.

Sec. 9. That the companies mentioned shall be governed by the provisions of the general railroad and telegraph laws of their respective states as to the construction and operation of the road and line in all matters not provided for in the act; and that "wherever the word 'company' or 'companies' is used in this act, it shall be construed to include the words 'their associates, successors or assigns' the same as if the words had been inserted, or thereto annexed."

Sec. 10. Excepted all mineral lands from the operation of the act, except that where they contain timber so much of the timber as shall be required

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for the construction of the road may be removed by the companies.

Sec. 11. That the companies shall obtain the consent of the legislatures of their respective States and be governed by the statutory regulations of those States in all matters pertaining to the right of way wherever the road and telegraph line shall not pass over the public lands of the United States.

Sec. 12. "That Congress may at any time, having due regard for the rights of said Oregon and California Railroad companies, add to, alter, repeal or amend this act."

ORGANIZATION OF WEST SIDE COMPANY.

For the purpose of organizing a corporation to be designated by the Legislature of Oregon as the beneficiary of so much of the lands granted by the Act of July 25, 1866, as were situate in Oregon, Joseph Gaston presented to the Secretary of State of Oregon on October 6, 1866, proposed articles of incorporation of the Oregon Central Railroad Company and requested him to file them. The Secretary received them and wrote upon them "October 6, 1866" and at the request of Gaston handed them back to him, who took them away. At the time the articles were presented to the Secretary they bore the signatures of eight persons, but no certificate of acknowledgment (Stip. R. IV-1554). A triplicate

THE FACTS ESTABLISHED

of the articles was filed in the office of the county clerk of Multnomah County, Oregon, under circumstances similar to those attending the filing with the Secretary of State, and a copy thereof was retained by Gaston as custodian for the incorporators (Gaston R. IV-1836-7).

The Legislature, on October 10, 1866, four days after the proposed articles of incorporation had been presented to the Secretary, as above stated, adopted the following joint resolution:

Whereas, The Congress of the United States, at its last session, passed an act granting land to aid in the construction of a railroad and telegraph from the Central Pacific Railroad in California, to Portland, Oregon, and made it the duty of the Legislative Assembly of the State of Oregon to designate the company, organized under the laws of Oregon, which shall receive that part of said land grant lying within the State of Oregon; therefore be it

Resolved by the House, the Senate concurring, That the "Oregon Central Railroad Company," a company organized under the general incorporation laws of this State, be and the same is hereby designated as the company which shall be entitled to receive the land granted and all the benefits of an Act of Congress approved

THE FACTS ESTABLISHED

July 25, 1866, entitled "An Act granting land to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, Oregon," so far as the said grant applies to the State of Oregon.

(Ans. R. II-865.)

On November 21, the same year, the articles of incorporation were returned to the office of the Secretary of State with ten additional names and two notarial certificates appended thereto. One certificate, dated November 16, same year, was to the effect that on or about September 29th, of that year, the articles had been acknowledged, signed and sealed by those whose names were signed thereto at the time when they were first presented to the Secretary of State. And the other certificate, dated November 20, same year, stated that the ten who had subsequently signed did so at a date after the designation of the corporation by the legislature. Upon the return of the articles they were again endorsed by the Secretary of State, but this time as having been filed on November 21, 1866 (Stip. R. IV-1554, 1625).

The stockholders of the company held their first meeting on May 24, 1867; shortly before this Joseph Gaston, as trustee for the company, subscribed for

THE FACTS ESTABLISHED

one-half of the capital stock for the stated purpose of legalizing the corporation, other parties signed for a share or two (Gaston, R. IV-1757-1834). At this meeting officers and directors were elected (Govt. Ex. 100-A. R. IX-4286). The next day, May 25, the board of directors adopted a resolution assenting to the Act of Congress of July 25, 1866, and on July 6, following, caused a certified copy thereof to be filed in the office of the Secretary of the Interior, together with a certified copy of the articles of incorporation and a certified copy of the joint resolution of the legislature of Oregon, above referred to. On August 20, following, the company filed in the same office a map of survey of its projected line of railroad (Stip. R. IV-1555). This line lay on the west side of the Willamette River and by reason of this it became known as the "West Side Line," and the company as the "West Side Company" (Stip. R. IV-1555).

ORGANIZATION OF EAST SIDE COMPANY.

On April 22, 1867, there were filed in the office of the Secretary of State for Oregon, articles of incorporation of another company under the same name as the first company, Oregon Central Railroad Company, with principal place of business at Salem, Oregon (Stip. R. IV-1555). The first meeting of the incorporators of this company was held on the same day. At this meeting George L. Woods

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was instructed by those present to subscribe for 70,000 of the 72,500 share sauthorized "for the use and disposal of the company" (Govt. Ex| 100—B. R. X.-4895). This company became known as the "East Side Company," and its line of railroad as the "East Side Line" by reason of the location of the line on the easterly side of the Willamette river (Stip. R. IV-1556).

CONTROVERSY BETWEEN THE TWO COMPANIES.

Immediately after the filing of the articles of incorporation of the East Side Company, a controversy arose between it and the West Side Company over the use of the corporate name (Gaston, R. IV-1789). During the first part of the year 1868, each company attacked the legality of the other. Pamphlets were issued (Govt. Exs. 103 and 104, R. X. 5153-5158) and public meetings held (Gaston, IV-1764), at which the East Side Company was represented by John H. Mitchell, afterwards United States Senator from Oregon, and I. R. Moores, and the West Side Company by Joseph Gaston (Gaston, R. IV-1758). At this time the East Side Company made no claim to the land grant under the Act of Congress of July 25, 1886 (Gaston, R. IV-1770), and in a pamphlet issued by it, (Govt. Ex. 104-R. X.-5158) about May 1, 1868, a positive disclaimer was made in words as follows:

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The charge has been extensively circulated that we are seeking to defraud the west side of the river of a valuable franchise—of state and government aid—in answer to which we have only to say, that we recognize that the Act of Congress granting lands, and the Act of the last legislature of Oregon, are both inoperative, from the fact that the terms and stipulations of those Acts have not been, and cannot be, complied with. Any aid to be granted railroad enterprises in Oregon must be re-enacted by both the state and general government * * * .
(Gov. Ex. 104-R. X.-5172.)

The West Side Company began construction work on April 15, 1868 (Gaston, R. IV-1760), and at the end of that year the larger bridges were built and the road graded for the first five miles out of Portland (Gaston, R. IV-1762). On June 25, same year, Congress passed an Act extending the time for the construction of the road by providing that “the first section of twenty miles of said railroad and telegraph line shall be completed within eighteen months from the passage of this Act, and at least twenty miles in each two years thereafter and the whole on or before July 1, 1880.” In a pamphlet issued by Gaston, as president of the company, it is stated that this Act was passed at the solicitation of the West Side Company (Stip. R. X.-5247).

THE FACTS ESTABLISHED**EFFORTS OF THE EAST SIDE COMPANY TO SECURE THE GRANT.**

The East Side Company began work on April 16, 1868, (Gaston, R. IV-1760), and prior to February, 1869, had expended about \$150,000 in grading (Gaston, R. V.-2423), between Portland and Salem (Himes, R. V.-2443). About September 12, same year, the West Side Company discovered that the East Side Company was making an effort to have the Oregon Legislature designate it as the beneficiary of the land grant under the Act of Congress of July 25, 1866, (Gaston, R. IV-1768-1770). Both companies appeared before the legislature, the East Side Company represented by John H. Mitchell and Ben Holladay (who had a short time before secured control of the East Side Company), and the West Side Company by James K. Kelly (Gaston, R. IV-1771). The contest resulted in the passage by the legislature on October 20, 1868, of the following joint resolution:

Whereas, The Congress of the United States, by an Act approved July 25, 1866, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon," did grant certain lands in the State of Oregon, and confer certain benefits and privileges upon such company organized under

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the laws of Oregon as the Legislature of said State should thereafter designate; and

Whereas, The Legislative Assembly of Oregon, at its fourth regular session, did adopt a joint resolution known as "House Joint Resolution No. 13," designating in terms the Oregon Central Railroad Company as the company entitled to receive the land granted by, and all the benefits and privileges of, the said Act of Congress; and

Whereas, At the time of the adoption of the said joint resolution as aforesaid, no such company as the Oregon Central Railroad Company was organized or in existence, and the said joint resolution was adopted under a misapprehension of facts as to the organization and existence of such company; and

Whereas, The designation of the company to receive the lands in the State of Oregon granted, and the benefits and privileges conferred by, the said Act of Congress, yet remains to be made;

Be it Resolved by the Senate, the House concurring, That the Oregon Central Railroad Company, a corporation organized at Salem on the twenty-second (22d) day of April, in the year one thousand eight hundred and sixty-seven (1867), under and pursuant to the laws

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of the State of Oregon, be and the same is hereby designated as the company entitled to receive the lands in Oregon, and the benefits and privileges conferred by the said Act of Congress. (Gaston, R. IV-1772.)

After this action, the contest between the companies was carried before Congress. The Act of 1868 required, as we have seen, that assent to its provisions be filed by the designated company within one year after its passage. This time had elapsed before the East Side Company secured its designation. Application was, therefore, made to Congress by that company for an extension of time. The West Side Company resisted. John H. Mitchell represented the East Side Company, and Simon G. Reed the West Side Company at Washington (Gaston, R. IV-1772). A pamphlet (Govt. Ex. 105-R. X.-5176) was prepared by Mitchell and approved by the East Side Company November 25, 1868, (Govt. Ex. 100-B. R. X.-5023) defending the right of that company to the benefits of the Act of July 25, 1866. This pamphlet was prepared for circulation in Washington only. A copy of it was found in the files of the Secretary of the Interior (Griffith, R. IV-1900). In answer to this pamphlet, Reed and President Gaston, prepared pamphlets for use before Congress (Govts. Ex. 106, R. X.-5228) setting forth the claims of the West Side Company

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and opposing an extension of time for filing the assent required by the Act of 1866 (Gaston, R. IV-1792). The minutes of the East Side Company show a payment to John H. Mitchell on account of his trip to Washington with reference to this matter (Govt. Ex. 100-B., R. X.-5026). On January 19, 1869, Senator Williams of Oregon wrote a letter to the Secretary of the Interior with respect to the controversy between the two companies in which he said:

I have nothing to say as to the rights or claims of either company, but in view of the fact that the articles of incorporation of the West Side Company were not filed in the office of the Secretary of State until after its designation by the Legislature in 1866, and in view, also, of the fact that the East Side Company cannot file its assent as required by the sixth section of said Act, I am apprehensive that the benefits of the said Act will be wholly lost to the state unless something is done to prevent it.

The Secretary replied the next day. He assumed that the statement made by the Senator, with respect to the organization of the West Side Company was correct, then referred to the bill pending before Congress for an extension of time within which to file the assent, and said:

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The passing of the bill, as stated, is to authorize this company (meaning the East Side Company) to file its assent without prejudice to the rights or interests of the other company, and you ask for an expression of my views as to whether there is any necessity for the proposed legislation. In reply I have the honor to state that as the matter now stands that the grant, so far as the portion in Oregon is concerned, has lapsed, while the grant for that portion of the road situated in California is still in force, and some legislation by Congress is necessary to revive the grant for the Oregon portion of the line. The proposed bill, if it becomes a law, will, in my opinion, accomplish that purpose. (Govt. Ex. 130, R. IV-1913).

The bill referred to was passed April 10, 1869, and reads:

That section six * * * be, and the same is hereby, amended so as to allow any railroad company heretofore designated by the legislature of the State of Oregon, in accordance with the first section of said act, to file its assent to such act in the Department of the Interior within one year from the date of the passage of this act; and such filing of its assent, if done within one year from the passage hereof, shall have the same force and effect to all

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intents and purposes as if such assent had been filed within one year after the passage of said act: *Provided*, That nothing herein shall impair any rights heretofore acquired by any railroad company under said act, nor shall said act or this amendment be construed to entitle more than one company to a grant of land: *And provided further*, That the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.

Two days after the approval of this act John H. Mitchell, as the attorney of the East Side Company, addressed a letter to the Secretary of the Interior reciting the terms of the act of July 25, 1866, and of April 10, 1869, touching the time for filing assent, and said:

This assent will be presented for filing as soon as I can return to Oregon and have a resolution for that purpose adopted by the company.

He then requested the Secretary not to recognize the West Side Company, called attention to the above letter of the Secretary, addressed to Senator Williams, and asked that no action be taken until the assent of the East Side Company could be filed (Govt. Ex. 130, R. IV-1914).

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The East Side Company, through its board of directors, on June 8, 1869, adopted a resolution reciting the passage of the act of July 25, 1866, the provisions therein relating to the designation by the Legislature of Oregon of a company to receive the grant made thereby, the requirement that the company designated should file its assent with the Department of the Interior within one year from the date of the passage of the act, that no company so designated had done so, that the East Side Company had been designated by the legislature of Oregon, that Congress had passed the act of April 10, 1869, extending the time within which the company designated might file its assent, and then said:

This company, the Oregon Central Railroad of Salem, Oregon, * * * do hereby accept all the provisions, rights, privileges and franchises of said act of July 25, 1866, * * * and of *all acts amendatory* thereof, upon the conditions therein specified, and do hereby give our assent and the assent of such company thereto.

The resolution follows with a direction to the secretary of the company to file a certified copy thereof in the office of the Secretary of the Interior, which was done on June 30, 1869. On October 29, same year, the company filed in the same office a map of survey of location of the first 60 miles of

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its projected line (Stip. R. IV-1557), and on December 24, following, it completed the first 20 miles within the prescribed time (Stip. R. IV-1557).

WEST SIDE COMPANY ABANDONS ALL CLAIMS TO THE GRANT UNDER ACT OF 1866, AND SECURES INSTEAD THE GRANT MADE BY THE ACT OF MAY 4, 1870.

The West Side Company failed to complete the first 20 miles of its line within the time required and after that "it never made any claim to the grant" made by the act of 1866 (Gaston, R. IV-1775, 9). Immediately after the failure Gaston initiated efforts to secure a new grant for the West Side Company, which resulted in the passage of the act of May 4, 1870, (Gaston, R. IV-1779, *et seq.*) which provides:

That for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamhill River, near McMinnville, in the State of Oregon, there is hereby granted to the Oregon Central Railroad Company, now engaged in constructing the said road, and to their successors and assigns, the right of way through the public lands of the width of one hundred feet on each side of said road, and the right to take from the adjacent public lands materials for constructing said road, and also the necessary lands

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for depots, stations, sidetracks, and other needful uses in operating the road, not exceeding forty acres at any one place; and, also, each alternate section of the public lands, not mineral, excepting coal or iron lands, designated by odd numbers nearest to said road, to the amount of ten such alternate sections per mile, on each side thereof, not otherwise disposed of or reserved or held by valid preemption or homestead right at the time of the passage of this act. And in case the quantity of ten full sections per mile cannot be found on each side of said road, within the said limits of twenty miles, other lands designated as aforesaid shall be selected under the direction of the Secretary of the Interior on either side of any part of said road nearest to and not more than twenty-five miles from the track of said road to make up such deficiency.

Sec. 2. That the Commissioner of the General Land Office shall cause the lands along the line of the said railroad to be surveyed with all convenient speed. And whenever and as often as the said company shall file with the Secretary of the Interior maps of the survey and location of twenty or more miles of said road, the said Secretary shall cause the said granted lands adjacent to and coterminous with

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such located sections of road to be segregated from the public lands; and thereafter the remaining public lands, subject to sale within the limits of the said grant, shall be disposed of only to actual settlers at double the minimum price for such lands: *And provided also*, That settlers under the provisions of the homestead act who comply with the terms and requirements of said act, shall be entitled, within the said limits of twenty miles, to patents for an amount not exceeding eighty acres each of the said ungranted lands, anything in this act to the contrary notwithstanding.

Sec. 3. That whenever and as often as the said company shall complete and equip twenty or more consecutive miles of the said railroad and telegraph, the Secretary of the Interior shall cause the same to be examined, at the expense of the company, by three commissioners appointed by him; and if they shall report that such completed section is a first-class railroad and telegraph, properly equipped and ready for use, he shall cause patents to be issued to the company for so much of the said granted lands as shall be adjacent to and coterminous with the said completed sections.

Sec. 4. That the said alternate sections of land granted by this act, excepting only such

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as are necessary for the company to reserve for depots, stations, sidetracks, wood yards, standing ground, and other needful uses in operating the road, shall be sold by the company only to actual settlers, in quantities not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre.

Sec. 5. That the said company shall, by mortgage or deed of trust to two or more trustees, appropriate and set apart all the net proceeds of the sales of the said granted lands as a sinking fund, to be kept invested in the bonds of the United States, or other safe and more productive securities, for the purchase from time to time, and the redemption at maturity, of the first-mortgage construction bonds of the company, on the road depots, stations, sidetracks, and wood yards, not exceeding thirty thousand dollars per mile of road, payable in gold coin not longer than thirty years from date, with interest payable semi-annually in coin not exceeding the rate of seven per centum per annum; and no part of the principal or interest of the said fund shall be applied to any other use until all the said bonds shall have been purchased or redeemed and canceled; and each of the said first-mortgage bonds shall bear the cer-

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tificate of the trustees, setting forth the manner in which the same is secured and its payment provided for. And the district court of the United States, concurrently with the State courts, shall have original jurisdiction, subject to appeal and writ of error, to enforce the provisions of this section.

Sec. 6. That the said company shall file with the Secretary of the Interior its assent to this act within one year from the time of its passage; and the foregoing grant is upon condition that said company shall complete a section of twenty or more miles of said railroad and telegraph within two years, and the entire railroad and telegraph within six years from the same date.

On July 2, 1870, the company, through its directors, assented to and accepted all the provisions of the grant, and on July 20, following, filed the assent in the office of the Secretary of the Interior, as required by the act (Stip. R. IV-1559).

ORGANIZATION OF THE DEFENDANT OREGON AND CALIFORNIA RAILROAD COMPANY.

In the year 1869 the East Side Company was involved in litigation, wherein the validity of its in-

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corporation and the right to use its corporate name were questioned (Gaston, R. IV-1762, *et seq.*; Newby v. Oregon Central Railroad Company, Fed. Cas. 10144, 10145).

(Note: The Supreme Court of Oregon in Holladay vs. Elliott, decided in 1879, that the "attempted organization of the O. C. R. R. Co. (East Side Company) amounted to nothing, was absolutely void, nor did the joint resolution of the legislative assembly adopted October 20, 1868, recognizing this corporation as the one entitled to receive the land granted by Act of Congress * * * cure the inherent defects of its organization." (8 Ore. 91; Stip. R. IV-1623.)

On March 17, 1870, articles of incorporation of the Oregon and California Railroad Company (defendant) were filed in the office of the Secretary of State for Oregon. Ben Holladay, J. C. Hawthorne and I. R. Moores were among the signers of the articles. Holladay was at this time in control of the East Side Company through stock ownership. Moores was president and Hawthorne a director of the same company (Govt. Ex. 100-B-5058). The articles recited the purpose of the corporation to be, among other things, to acquire,

Particularly and especially all the right, title, interest, franchise, claim and demand

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which the said Oregon Central Railroad Company of Salem, Oregon, (East Side Company) * * * now has or is entitled to, and to which it may hereafter be entitled under and by virtue of an Act of Congress * * * approved July 25, 1866, and of all amendments thereto. And to construct and establish the whole thereof (railroad and telegraph line) from Portland in Oregon, to the California line in all respects in accordance with the Act of Congress hereinbefore referred to and the amendments thereto, and for the purpose of receiving all the benefit of such acts of Congress and amendments thereto, and intended to be conferred thereby on the Oregon Company, and for the purpose of complying with all the provisions of said act. (Bill, R. I-89; Stip. R. IV-1558.)

By an instrument, dated March 29, 1870, the East Side Company assigned and conveyed to the new corporation, the Oregon and California Railroad Company, all of its property, including the land grant, with present and future rights under the act of July 25, 1866, and acts *amendatory* thereof. This instrument recites that the

Oregon Central Railroad Company * * * did afterwards and in pursuance of the act of Congress aforesaid (act of July 25, 1866), and of the acts amendatory thereof and supple-

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mental thereto, file its assent in writing to said Act of Congress and all the provisions thereof
 * * * was recognized by the Department of the Interior as the corporation in Oregon entitled to take and manage the congressional grant hereinbefore referred to and receive the benefits thereof * * *

and did

Afterwards proceed to locate the line of said railroad, and did locate the same for a long distance and did prepare and file its maps in the office of the Secretary of the Interior in strict accordance with the said act of July 25, 1866, and amendments thereto aforesaid'' (Stip. R. IV-1558).

By action of the stockholders and of the board of directors at meetings held March 28 and 29, following, the East Side Company was dissolved (Govt. Ex. 100-B; R. X.-5099, 5117).

THE ASSENT OF THE OREGON AND CALIFORNIA RAILROAD
 COMPANY.

On April 4, 1870, the Oregon and California Railroad Company, through its board of directors, adopted a resolution reciting that that company had purchased and taken an assignment from the East Side Company of its property, including

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All the right, title, interest and claim, both legal and equitable, absolute and contingent, of the East Side Company to the lands and all other benefits granted to that company by the act of July 25, 1866, and amendments thereto, and said:

Resolved, That this company do accept the grant conferred by such Act of Congress (July 25, 1866) and all the benefits and emoluments thereunder or thereby granted, upon the terms and conditions therein specified;

And Resolved, That the president and secretary of this company be, and they are hereby, authorized to file the assent of this company to such act of Congress and amendments thereto, as aforesaid, in the office of the Secretary of the Interior. * * * And that a copy of the deed of assignment from the Oregon Central Railroad * * * be also filed in the same office.

This was done on April 28, following. It is stipulated in the record that

At all times since the date of said instrument, (conveyance of March 29), the defendant Oregon and California Railroad Company has assumed and still assumes itself to be the successor of the East Side Company in and to all the franchises, rights and property granted, or

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intended to be granted by the said Acts of Congress. (Stip. R. IV-1559).

Under date of May 7th, same year, the Secretary of the Interior informed the Commissioner of the General Land Office, that evidence had been filed by the Secretary of the East Side Company

That said company has sold and transferred all its rights, interests, etc., to the Oregon and California Railroad Company, of Portland, Oregon.

This notice was acknowledged by the Commissioner May 23, 1870, and on the same day he wrote notifying the Register and Receiver of the United States Land Office at Oregon City, Oregon, of the information received from the Secretary of the Interior (Deft. Ex. 373, R. XIV-7371). This matter was again considered in 1871, and an opinion rendered by the Assistant Attorney-General for the Interior Department, to the effect that the use of the word "assigns" in the Act of Congress of July 25, 1866, authorized the conveyance of the grant by the East Side Company to the Oregon and California Railroad Company. After some correspondence between the Attorney-General and Secretary of the Interior, the matter was permitted to stand on the action of the Secretary of the Interior in his notification to the Commissioner of the transfer of the grant (Deft. Ex. 376; R. XIV-7439).

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OREGON AND CALIFORNIA RAILROAD COMPANY SECURES
CONTROL OF WEST SIDE COMPANY.

In the spring of 1870, Holladay, controlling practically all of the stock of the Oregon and California Railroad Company and being its president (Defts. Ex. 341, R. XIV-7309, Govts. Ex. 129, R. XI-5765), entered into negotiations with Joseph Gaston to acquire control of the West Side Company, offering, among other inducements, a township of the granted lands in part payment for a majority of the stock of that company. This, Gaston at first refused, upon the ground that Holladay could not dispose of the granted lands that way but must conform to the provisions of the granting acts and sell to actual settlers (Gaston, R. IV-1787). Later, however, Gaston, having been offered \$50,000 and employment for a term of years, yielded to Holladay's wishes and assigned a majority of the stock of the West Side Company to R. H. Towler, private secretary to Holladay, and immediately thereafter Holladay assumed control of the company (Gaston, R. IV-1797). This transfer was made on or about August 15, 1870 (Govt. Ex. 100-A; R. IX-4424). Holladay continued in control of the two companies until he surrendered the same to the bondholders committee (Gaston, R. IV-1788, 1798), under an agreement dated February 29, 1876 (Govt. Ex. 126-D; R. XI-5603).

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EARLY EFFORTS TO HAVE EXECUTIVE OFFICES OF THE GOVERNMENT PUT UPON THE GRANTS A CONSTRUCTION SOMEWHAT SIMILAR TO THAT NOW CONTENTED FOR BY DEFENDANTS.

On April 15, 1870, the Oregon and California Railroad Company, conveyed the granted lands to trustees to secure a bond issue of \$10,950,000. The trustees were given the right to sell or dispose of the lands upon such terms as the president of the Oregon and California Railroad Company might approve, the proceeds of the sales to be applied to the payment of the interest and principal of the bonds secured (Govt. Ex. 126-A, R. XI-5530).

By an instrument dated March 20, 1871, the trustees and the Oregon and California Railroad Company, assigned and conveyed the lands to the European and Oregon Land Company (a California corporation organized by Holladay) (Gaston, R. IV-1840), describing them as lands granted by the Act of July, 1866, and "acts amendatory and supplemental thereof." Under the conditions of this instrument the lands were to remain in the possession of the grantor trustees until the grantee had paid the agreed price. (Gov. Ex. 126-I. R. XI-5734.)

Joseph S. Wilson, as president of the European and Oregon Land Company, under date of January 17, 1872, wrote George H. Williams, then Attorney General of the United States and former Senator from Oregon, with respect to the land grants. He

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called attention to the actual settlers provision of the act of April 10, 1869, and said that, in pursuance of a legal opinion, the board of trustees of his company had ordered that persons who had become actual settlers between July 25, 1866, and April 10, 1869, should have the privilege of purchasing not to exceed 160 acres at \$2.50 an acre, but as to *all others* the company was *not* legally restricted from selling on liberal terms, for cash or credit, at reasonable rates. He further stated that he had been directed by the company to lay the facts before the Attorney-General, to the end that the same might be referred to the Interior Department, with the request that the liberal construction given by the trustees of the company might be approved (Gov. Ex. 109; R. X.-5339). With this letter he enclosed a copy of the legal opinion referred to, and also a copy of the minutes of his company, setting forth the above agreement between it, the trustees named in the instrument conveying the lands to it, and the Oregon and California Railroad Company. This letter, with the papers attached thereto, was not sent directly to the Attorney-General, but was enclosed with another letter to President Holladay of the Oregon and California Railroad Company. In the latter letter Mr. Wilson requested Mr. Holladay to ask the Attorney-General to procure from the Secretary of the Interior a construction of the grants

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desired (Gov. Ex. 109; R. X.-5341), and enclosed a draft of the decision sought. We quote therefrom:

The Department has considered the papers you referred from the European and Oregon Land Company, in right of the Oregon and California Railroad Company, under the Grant in Western Oregon, by Act of Congress approved 25th July, 1866, (Statutes Vol. 14, page 239) and the Amendatory Act of 10th April, 1869, (Stat. 1869, page 47) and is satisfied that the construction given by the said company is just and proper, to the effect that an actual settler on the odd sections from 25th July, 1866, the date of the Original Grant, and all those who went on the odd sections from that date to the passage of the Act of 10th April, 1869, and all those who are found on such odd sections when the line of the railroad is surveyed and established, are protected; and have the right to purchase, each one, not exceeding one hundred and sixty acres, at two dollars and fifty cents per acre—but that in regard to all other persons, the Original Absolute Grant, by Act of 25th July, 1866, is in full force and effect, and authorizes the company to sell on such terms as may be reasonable and just to all parties without any restrictions. (Gov. Ex. 109-R. X.-5346.)

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Attorney-General Williams on April 20, 1872, wrote to the Commissioner of the General Land Office:

I enclose some papers which have been transmitted to me by the Attorney of the Oregon and California Railroad Co. to be filed I suppose in your office.

You will see that they relate to the construction of an amendment to the act granting lands to said Co. (Gov. Ex. 109-R. X.-5364.)

The Commissioner on May 20, 1872, laid before the Secretary of the Interior this letter and all accompanying papers and stated that the purpose of the enclosed correspondence was to obtain a construction of the actual settlers provision of the Act of Congress of April 10, 1869. To the Commissioner's letter the Secretary replied, under date of June 5, 1872, as follows:

I have considered the question presented in the papers transmitted with your letter of the 20th ultimo, as to the meaning of the last proviso of the Act approved 10th April, 1869, amendatory of the Act of 25th July, 1866, 'granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland in Oregon,' and am of opinion that the proviso

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means just what it says, 'that the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.' The legislative intention was plainly to prevent the lands from being held for speculative prices and disposed of in large quantities to other than actual settlers; and to limit the proviso's operation to those on the lands granted at or before the survey of the road, would, in my judgment, utterly defeat such intention.

The papers transmitted with your letter are herewith returned. (Gov. Ex. 109-R. X.-5343.)

The Commissioner on June 14, same year, transmitted this opinion to the Attorney-General (Govt. Ex. 109, B; R. X-5367).

An entry on the jacket in the files of the General Land Office containing the correspondence on this subject shows that on June 27, 1872, the Attorney-General returned certain papers relative to the Oregon and California Railroad Company and asked a recall of the Secretary's opinion (Govt. Ex. 109-R. X.-5322).

Under date of July 16, 1872, the Commissioner wrote to the Attorney-General a letter from which we quote:

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I have the honor to acknowledge your communication of 27th ult., returning certain papers filed with you, by B. Holladay, Esq., relative to the construction to be placed on the last proviso of the Act of 10th of April, 1869, amendatory of the Act of 26th of July, 1866, granting lands for the Oregon & California Railroad.

It is stated in your letter that the papers contain no communication to me or to the Secretary of the Interior, asking any action or decision in reference to the subject which they discussed. That they were not filed with the view of eliciting any opinion, and that you did not suppose any would be given until some questions were presented which it would be necessary for the Department to decide, etc. You, therefore, ask * * * that the opinion which the Secretary has given upon the subject may be withdrawn until some question is raised, making it necessary to pass upon the construction of the Act mentioned, or until the parties interested desire an opinion on the subject.

He then analyzed the papers laid before him and concluded thus:

I certainly had no doubt but that the Company did desire, and asked for, the view of the office on the matter.

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It was not understood that you desired the opinion, but the letter was addressed to you because I viewed you as the medium of communication adopted by the Company.

Your request for a recall of the opinion expressed was presented to the Secretary who desires me to state that while he must respectfully decline to formally withdraw his opinion, yet, in view of your letter, he will be willing at any time, on application to reopen the case and to have all arguments the Company may desire to present upon the matter.

The papers have, as you requested, been placed on file. (Govt. Ex. 109-D, R. X.-5370).

[It was stipulated between the parties in this suit that all the facts and circumstances proven by Govt. Ev. 109 (R. X.-5322) should for all purposes be deemed to have been specifically pleaded in detail in the bill of complaint (Stip. R. IV-1909).]

By an instrument dated July 25, 1874, the European and Oregon Land Company reconveyed to Latham, Atherton and Norris, as Trustees, the lands in question, except about four thousand acres which the company had sold. (Gov. Ex. 126-G, R. XI-5688.)

By a trust deed dated July 15, 1871, the *West Side Company* conveyed to Milton S. Latham and

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Faxon D. Atherton, Trustees, all of its railroad property, and the land grant under the act of May 4, 1870, to secure a bond issue of \$4,395,000.00 (Govt. Ex. 126-B, R. XI-5548).

PROGRESS OF CONSTRUCTION ON BOTH LINES AND FINANCIAL DIFFICULTIES UP TO OCTOBER 6, 1880.

By the sale or pledge of mortgage bonds approximately \$8,000,000 was procured by the Oregon and California Railroad Company during the year 1870, and nearly \$1,000,000 was raised in the same way during 1871 by the West Side Company. With the funds thus secured the work of construction on both railroads was proceeded with, on the West Side line until 1871 and on the East Side line until 1873. On the dates mentioned the West Side line was completed from Portland to McMinnville, a distance of 47 miles, and on the East Side line to a point near Roseburg, a distance of 197 miles. Work was then suspended for want of funds. It was never resumed on the West Side line and on the East Side line not until 1881 (Stip. R. IV-1560, 1561).

On or about July 24, 1874, control of the financial affairs of both companies was taken over by a bondholders' committee, and in February, 1876, the same committee acquired all the stock of both companies and held the same until 1881 (Govt. Ex. 126-D; R. XI-5603; Stip. R. IV-1561).

THE FACTS ESTABLISHED

WEST SIDE COMPANY TRANSFERS ALL ITS PROPERTY TO THE OREGON AND CALIFORNIA RAILROAD COMPANY AND IS DISSOLVED.

The West Side Company, in October, 1880, assigned and conveyed to the Oregon and California Railroad Company all its property, including its interest in the land grant of May 4, 1870. The stated consideration being the payment of all the debts of the West Side Company. A copy of this conveyance was filed with the Secretary of the Interior about October 20, 1880 (Stip. R. IV-1561).

The stockholders approved the conveyance and at the same time adopted a resolution, which reads, in part, as follows:

Resolved, that this company, the Oregon Central Railroad Company be, and the same is hereby, dissolved, to take effect on the transfer of the propetry of this company and the settling of its business (Govt. Ex. 100-A; R. IX-4871).

On May 28, 1883, the board of directors passed a resolution to the effect that at the time of the dissolution of the company, and the disposal of its property, there was some property which was not conveyed, because it was in litigation, and then authorized the transfer of this property to the Oregon and California Railroad Company (Govt. Ex. 100-A; R. IX-4874).

THE FACTS ESTABLISHED

At all times since the date of the conveyance by the West Side Company, on October 20, 1880, the Oregon and California Railroad Company has assumed to be the successor of that company under the grant of May 4, 1870 (Stip. R. IV-1561).

PROGRESS IN THE CONSTRUCTION OF THE RAILROAD, FINANCIAL TRANSACTIONS OF THE OREGON AND CALIFORNIA RAILROAD COMPANY AFTER 1880, AND STEPS BY WHICH THE SOUTHERN PACIFIC COMPANY SECURED CONTROL OF THAT COMPANY.

All of the outstanding capital stock of the Oregon and California Railroad Company was cancelled on or about May 7, 1881. The authorized capital stock was then established at, and still is \$19,000,000, consisting of \$12,000,000 preferred and \$7,000,000 common. This stock was issued and accepted in part payment of the existing indebtedness; the balance was taken care of by a bond issue and *all* mortgages and *other* instruments purporting to secure the indebtedness were satisfied and cancelled (Stip. R. IV-1562).

In pursuance of the adjustment of its financial affairs the Oregon and California Railroad Company, on June 2, 1881, delivered to Henry Villard, Robert Peebles and Charles Edward Bretherton, as trustees for the owners and holders of the preferred stock, a trust deed covering all its property.

THE FACTS ESTABLISHED

By subsequent action under the last mentioned trust deed, Stephen T. Gage (defendant) became, and is now the only surviving trustee thereunder. The defendant Southern Pacific Company is the present owner of all of the preferred stock (Stip. R. IV-1563). Gage, as such trustee, and the Southern Pacific Company, as the owner of the stock, assert a lien upon the lands covered by the trust deed.

By two separate issues of bonds, bearing date June 1, 1881 and May 26, 1883, respectively, (known and designated as "First Mortgage Bonds" and "Second Mortgage Bonds"), the Oregon and California Railroad Company procured approximately \$5,000,000 for its construction fund. And about June 1, 1881, the work of constructing the East Side Railroad was resumed and thereafter continued until about January, 1884. During this period the road was extended from Roseburg to Ashland, Oregon, a distance of approximately 145 miles (Stip. R. IV-1563). In January, 1884, construction was discontinued.

About January 19, 1885, default having been made in the payment of interest, suit was brought in the United States Circuit Court for Oregon, by certain of the first mortgage bondholders and the company was placed in the hands of a receiver. (Stip. R. IV-1564).

THE FACTS ESTABLISHED

The Central Pacific Railroad Company, by consolidation, became about this time the owner of the Western Pacific Railroad Company and the California and Oregon Railroad Company. In this way it secured all the lands granted to the California and Oregon Company by the act of July 25, 1866, in addition to its own lands acquired under the act of July 2, 1864, and continued to be the owner of all these lands until 1899. In February, 1885, it leased its line of railroad from Ogden to San Francisco and the branch thereof from Roseville Junction to Delta, California, together with certain other railroads and properties used in connection therewith, to the Southern Pacific Company for a period of ninety-nine years. Under this lease the Southern Pacific Company took possession of the property covered thereby and has ever since held and controlled the same (Stip. R.IV-1569; Ans. R.II-957).

On October 11, 1886, the Central Pacific Railroad Company, Pacific Improvement Company (a California corporation), and the Southern Pacific Company, made an agreement whereby the Pacific Improvement Company was to construct a line of road which would connect the Central Pacific lines with the lines of the Oregon and California Company. This agreement further provided that the Pacific Improvement Company would, within a reasonable time, purchase and obtain possession and control of

THE FACTS ESTABLISHED

the Oregon and California Railroad Company (Stip. R. IV-1571).

Prior to this time the stockholders of the last named company had organized under the name of the "Stockholders Committee"; certain of the bondholders thereof under the name of "Frankfort Bondholders' Committee" and certain others of the bondholders thereof under the name of the "London Bondholders' Committee." The Bondholders' Committees represented the owners of substantially all of the first and second mortgage bonds then outstanding. (Stip. R. IV-1572).

In March, 1887, the Pacific Improvement Company became the owner of a controlling interest in the Southern Pacific Company and continued to hold the same until April, 1901 (Stip. R. IV-1573). About this time, to wit, March 28, 1887, a contract was entered into between the Pacific Improvement Company, the committees just mentioned, the Southern Pacific Company, and the Union Trust Company of New York, which resulted in the transfer of all the capital stock and all the second mortgage bonds of the Oregon and California Railroad Company to the Pacific Improvement Company and of all the first mortgage bonds of the Oregon and California Railroad Company to the Southern Pacific Company (Stip. R. IV-1572). The stock thus transferred to the Pacific Improvement Company was held by

THE FACTS ESTABLISHED.

it until 1901, and then delivered to the Southern Pacific Company, which has ever since owned and held the same.

On July 1, 1887, the Oregon and California Railroad Company conveyed to the Union Trust Company of New York by trust deed all its railroad lines constructed or to be constructed and all its other properties including both land grants, to secure the payment of a \$20,000,000 bond issue. The payment of these bonds was guaranteed by the Southern Pacific Company. Part of the proceeds of this bond issue was used to pay the first and second mortgage bonds issued June 1, 1881, and May 26, 1883, respectively (Stip. R. IV-1573, 1575):

On the same day on which the aforementioned trust deed was executed, namely, July 1, 1887, the Oregon and California Railroad Company leased all its property to the Southern Pacific Company for a period of forty years; pursuant to this agreement the lessee took possession of the property. On June 6, same year, a contract was entered into between the Oregon and California Railroad Company and the Pacific Improvement Company for the construction by the latter company of the former company's railroad from a point near Ashland, Oregon, south to the northern boundary line of the State of California, there to connect with the California and Oregon Railroad, and to equip the road

THE FACTS ESTABLISHED.

with rolling stock and a telegraph line. At the time this contract was made a large part of the work provided for therein had been done by the Pacific Improvement Company (Stip. R. IV-1576). In December following, the railroad was completed and connected with the line of the California and Oregon Railroad Company (Hood, R. IV-2061).

January 1, 1888, the Central Pacific Railway Company leased to the Southern Pacific Company its railroad from Delta to the northern boundary line of the State of California, and thus the Southern Pacific Company secured control of the entire line from Portland to Delta (Stip. R. IV-1570). On June 6, following, the receivership proceedings against the Oregon and California Railroad Company heretofore referred to were dismissed, the receiver discharged, and all the first and second mortgage bonds issued prior to July 1, 1887, cancelled, and the mortgages securing them released (Stip. R. IV-1576).

On July 29, 1899, the Central Pacific *Railroad* Company conveyed to the Central Pacific *Railway* Company all of the unsold lands of the three land grants owned by it (Stip. R. IV-1568), and on August 1, 1899, the Southern Pacific Company became, and has since remained, the principal stockholder of the Central Pacific *Railroad* Company and Central Pacific *Railway* Company (Stip. R. IV-1571).

THE FACTS ESTABLISHED.

On August 1, 1893, the lease of July 1, 1887, between the Oregon and California Railroad Company and the Southern Pacific Railroad Company was abrogated and a new one entered into for a period of thirty-four years. In this lease the Southern Pacific Company agreed, among other things, to pay all expenses connected with the lands and the land department of the Oregon and California Railroad Company, except as the same should be paid from the rentals or proceeds of the lands, and in addition to this it agreed to pay \$5000 per year which so far as requisite was to be applied by the Oregon and California Railroad Company to the "expense of maintaining and keeping up its corporate organization under the laws of the state of Oregon." Under this lease the Southern Pacific Company has ever since operated the lines of the Oregon and California Company.

ADMINISTRATION OF LAND GRANTS AND THE CONNECTION
OF SOUTHERN PACIFIC COMPANY THEREWITH.

From about 1884 until 1888 George H. Andrews supervised the land department of the Oregon and California Railroad Company, with headquarters at Portland (Loring, R. V.-2187). In the latter year William H. Mills was appointed land agent of the company (Gov. Ex. 129, R. XI-5765; Minutes 161). He was at this time also land agent of the Central Pacific Company (Casey R. IV-1879), in which po-

THE FACTS ESTABLISHED.

sition he continued, maintaining offices in San Francisco (Eberlein R. V-2230). Andrews remained, however, in active charge of the Portland office, with authority to execute contracts and discharge such other duties in connection with the sale of lands as might be assigned to him by Mills (Gov. Ex. 129; R. XI-5765; Minutes 164). Mills kept in touch with the Portland office by visits thereto and examinations made by his representative, Judge Singer (Loring, R. V-2196).

This method of handling the lands contained until about January 1, 1903 (Loring R. V-2187).

Some time before this a group of financiers headed by E. H. Harriman (Eberlein, R. V-2307) acquired control of the Union Pacific Railroad Company, Southern Pacific Railroad Company and Southern Pacific Company, including the Oregon and California Railroad Company, and thereby formed what is known as the "Harriman System" (Eberlein, R. V-2229, 2298).

About January 1, 1903, Charles W. Eberlein, connected with the land department of the Union Pacific Railroad Company, was given charge, under the supervision of Judge Cornish, vice-president of that company, of the land grants of the Oregon and California Railroad Company, Central Pacific Railroad Company, and Southern Pacific Railroad Company (Eberlein R. V-2229, 2298). He estab-

THE FACTS ESTABLISHED.

lished headquarters at San Francisco. After looking into the land grants of the Oregon and California Railroad Company, he found that Mills had been keeping one set of records with respect to them in San Francisco and Andrews another set in Portland. This led to a serious confusion of accounts (Eberlein R. V-2229), and necessitated a reformation which was undertaken at once and completed in the Fall of 1904. After this all the records were removed from Portland to San Francisco (Eberlein R. V-2234), where they remained under Eberlein's general supervision. One set of men kept the books with reference to all the land grants which he controlled, but the records of the grants of each railroad were kept separate. (Eberlein, R. V-2231, 2234, 2235.)

Mr. Eberlein testified that in 1906 he issued circulars to the effect that he would sell agricultural and grazing lands as soon as applications made could be examined (R. V-2258), but as to the timber lands the company was not in a position to sell, and that he was authorized by Judge Cornish to sell only agricultural and grazing lands (R. V-2331-2). However, the only sale made by him from the time he took charge of the land department in 1903 until the time when he severed his connection therewith in 1908 was to the Southern Pacific Company (R. V-2280).

THE FACTS ESTABLISHED.

In September, 1908, B. A. McAllaster succeeded Eberlein as land commissioner of all the grants (McAllaster, R. IV-1920). His salary was fixed by Judge Cornish and was apportioned among the several companies served, without reference to the services rendered each (McAllaster, R. IV-2003). He took instructions from Judge Cornish and discussed with him the policy to be pursued in handling the lands of the Oregon and California Railroad Company (McAllaster, R. IV-2003, 1977). After the death of Judge Cornish in 1908, McAllaster received his instructions from R. S. Lovett, of the Southern Pacific Company, until 1910; then from Mr. Herrin, general counsel, and to some extent from Mr. Sproule, president of the same company. From the time of becoming land commissioner McAllaster kept his offices in the Flood Building at San Francisco, where the greater portion of the offices of the Southern Pacific Company were located. On the door leading to his office were printed the words, "Southern Pacific Company—Land Department—B. A. McAllaster, Land Commissioner—F. W. Houts, Assistant Land Commissioner" (McAllaster, R. IV-1894, 1895, 1896). (McAllaster says the words "Southern Pacific Company" had been placed there without his knowledge). On the letter heads used in his office were printed the words, "Southern Pacific Company—Land Department" and beneath them these words, "Southern Pacific

THE FACTS ESTABLISHED.

Land Co.—Southern Pacific Railroad Co.—Central Pacific Railway Co.—Oregon & California Railroad Co.—Oregon & California Land Co.—B. A. McAllaster, Land Commissioner—F. W. Houtz, Assistant Land Commissioner—Room 801, Flood Building—San Francisco, Cal.” (McAllaster, R. IV-1985; Gov. Ex. 112; R. XI-5477.)

There were used in his office, he said, other letter heads which contained only the words, “Oregon and California Railroad Company.”

The annual reports of the Southern Pacific Company contain the name of McAllaster as an officer of that company (McAllaster, R. IV-2009).

The question as to how much of the expenses of running McAllaster’s department should be borne by each of the railroad companies concerned was determined by the auditor of the Southern Pacific Company (Adams, R. V-2166, 2167).

The Southern Pacific Company is the operating company of its constituent lines, including the Oregon and California Railroad, and controls substantially all the transportation facilities of Oregon west of the Cascade Mountains and particularly south of Albany. (Eberlein, R. V-2306.)

PATENTED AND UNPATENTED LANDS.

Construction of the first section of twenty miles of the East Side line was finally approved on Janu-

THE FACTS ESTABLISHED.

ary 29, 1870, and the last on November 8, 1889. The first section of twenty miles of the West Side road was accepted and finally approved February 16, 1872, and the last, and only other section, June 23, 1876 (Stip. R. IV-1558).

Pursuant to the rules and regulations of the Department of the Interior all patents to the granted lands were issued upon applications in writing of the Oregon and California Railroad Company as the "successor and assignee" of the East Side and West Side companies, respectively. Each application contained a descriptive list of the lands for which patents were desired and was accompanied by an affidavit, signed and sworn to by the land agent of the defendant Oregon and California Railroad Company, alleging, among other things, that "The said lands are vacant, unappropriated, are not interdicted mineral, nor reserved lands and are of the character contemplated by the granting act," under which patents were applied for (Stip. R. IV-1586).

Under date of May 9, 1871, the first patent was issued covering lands of the East Side grant, and with the exception of Supplemental Patent No. 3, hereinafter referred to, the last patent was issued December 7, 1906. Under date of October 9, 1895, the first patent was issued covering lands of the West side grant and the last on March 20, 1903

THE FACTS ESTABLISHED.

(Gov. Ex. 110; R. X-5374; Stip. R. IV-1577). All of the patents under both the East and West Side grants were issued to the Oregon and California Railroad Company (Gov. Ex. 110; R. X-5374).

That part of the West Side railroad extending from Forest Grove to Astoria was never constructed, and for this reason the granted lands of the West Side grant continuous to such unconstructed railroad were, by act of Congress, approved January 31, 1885, declared forfeited to the United States.

The gross amount of land that has inured to the Oregon and California Railroad Company, under both the East and West Side grants, is 3,182,169.57 acres (Eddy, R. V-2569). Between the years 1871 and 1906 there were patented of the East Side grant 2,745,786.68 acres and between the years 1895 and 1903 there were patented of the West Side grant 128,618.13 acres (Stip. R. IV-1577, 1564).

Put in the form of a table the figures are:

Lands earned under		
both grants		3,182,169.57 acres
Patented under East		
Side grant	2,745,786.68	
Patented under West		
Side grant	128,618.13	2,874,404.81 acres
Total not patented		307,764.76 acres

THE FACTS ESTABLISHED.

Supplemental Patent No. 3, dated June 21, 1909, was issued upon a letter request of A. A. Hoehling, as attorney for the Oregon and California Railroad Company (Def. Ex. 250—R. XI-5767), which set forth a discrepancy in the descriptions of lands included in a patent issued May 29, 1872. To correct this description this supplemental patent was issued (Casey, R. IV-1863). The records of the General Land Office show that this matter was handled in that office by a clerk named Lord, who died prior to the taking of testimony in this case (Casey, R. IV-1866).

LANDS REMAINING UNSOLD AND REVENUE DERIVED FROM
BOTH GRANTS.

A correct description of all the unsold patented lands is given in Exhibit K of the bill (R. I-273, 508) as corrected by Exhibit No. 5 of the answer (R. II-987, 999; Stip. R. IV-1580).

Total unsold lands.....	2,360,492.81
Of which there has been	
patented	2,075,616.45
Unpatented	284,876.36
	<hr/>
	2,360,492.81 2,360,492.81

The reasonable value of these unsold lands exceeds the sum of \$30,000,000 and they are all claimed by the Oregon and California Railroad Company under and by virtue of the East and West Side grants (Stip. R. IV-1580, 1582).

THE FACTS ESTABLISHED.

The net amount received by the Oregon and California Railroad Company from the granted lands, as given by defendants, appears in the following table:

Receipts—

DEFT. EX. 289—R. XIII-6836.

From sales of lands.....	\$4,338,822.53
“ sales of timber on lands.....	18,850.25
STIP. R. IV-1583.	
“ forfeited contracts	88,205.06
“ lease of lands.....	5,532.07
“ timber used by R. R. Co.....	18,850.25
“ timber depredations	10,687.92
ANS.—R. II-915.	
“ interest on contracts.....	1,025,922.89
	<hr/>
	\$5,506,870.97

Disbursements—

DEFT. EX. 289; R. XIII-6836.

To advertising	\$ 34,784.85
“ law expenses	218,415.25
“ grading lands	142,651.40
“ U. S. Surveys.....	145,977.26
“ salaries and office expenses.....	624,344.19
“ stationery and printing.....	18,369.89
“ taxes on lands.....	1,827,776.94
	<hr/>
	\$3,011,776.94

THE FACTS ESTABLISHED.

Total receipts	\$5,506,870.97
“ disbursements	3,011,776.94

Credit balance\$2,495,094.03

(Bill prays for forfeiture of unsold lands only.)

Until about the year 1890 or 1891 there was substantially no demand for the granted lands except for the purpose of settlement or by persons of limited means able to purchase such lands only in quantities not exceeding 160 acres and at prices not exceeding \$2.50 an acre, and nearly all sales made prior to the year 1894 were of that character (Stip. R. IV-1584).

In the year 1888 an increased force of cruisers was employed by the land department of the Oregon and California Railroad Company to examine the lands (Loring, R. V-2197). Part of the cruisers' duties was to report on bodies of timber that could be operated together (Loring, R. V-2224). About one-half of the lands had been examined and reported on prior to October 1, 1904 (Loring, R. V-2199). A rapidly increasing demand for the lands in large quantities and at increased prices, commenced about 1889 or 1890 and has continued ever since (Stip., R. IV-1578). Approximately three-fourths of all sales made since 1887 were made by contracts providing for payments of purchase price in from five to ten annual payments and execution

THE FACTS ESTABLISHED.

of conveyances upon final payment. Many of these sale contracts were pending on January 1, 1903, pursuant to which conveyances were issued subsequently and a considerable number of them was still pending when this suit was brought (Stip., R. IV-1579).

At the time the joint and several answer was filed, 740,002.45 acres had been sold and conveyed, and 81,684.31 acres were under contracts of sale (Stip., R. IV-1579). About the same time there remained unsold of the granted lands 2,360,492.81 acres of which, as we have heretofore stated, 2,075,616.45 were patented, and 284,876.36 unpatented (Stip., R. IV-1580).

LAND DISPOSED OF IN QUANTITIES GREATER THAN 160 ACRES
TO ONE PERSON AND AT PRICES IN EXCESS OF \$2.50 PER
ACRE.

On April 15, 1870, the Oregon and California Railroad Company, as we have heretofore stated, conveyed all its lands in trust to certain trustees to secure a bond issue of \$10,950,000 and gave to the trustees the right to sell or dispose of the lands with the consent of the company and apply the proceeds thereof to the payment of the debt. (Govt. Ex. 126-A, R. XI-5530.) Afterwards the trustees and the railroad company united in a conveyance of the lands to the European and Oregon Land Company to be paid for at the agreed price of \$1.25 per acre. (Govt. Ex. 126, I, R. XI-5734.)

THE FACTS ESTABLISHED.

On or about the 2d day of June, 1881, the Oregon and California Railroad Company executed and delivered to Henry Villard, Robert Davie Peebles and Charles Edward Bretherton, as trustees, an instrument purporting to convey to said trustees all of the lands of both the East and West Side grants, in trust, to secure the payment of a preferential dividend, and it was made the duty of said trustees or their successors upon certain defaults,

To forthwith proceed to enforce this security, and to sell said rolling stock, equipment and appurtenances to the land and premises comprised herein or then subject to the lien of these persons, in one lot or in more than one lot or parcel and at one time or different times and for cash, or on reasonable credit, payment therefor being secured on the property sold, and otherwise upon such terms and in such manner as said trustees may, in their discretion think best. (Bill R. I-152; Stip. R. IV-1562.)

By mortgage deed dated July 1, 1887 (Ante p. 79), the Oregon and California Railroad Company conveyed to the Union Trust Company all of its unsold granted land, to secure a bond issue and authorized the trustees in case of default,

To cause the whole of the said premises, estates, franchises, roads, privileges and property hereby granted and conveyed * * * to

THE FACTS ESTABLISHED.

be sold at public auction in the city of New York in the state of New York, or in the city of Portland, in the state of Oregon.

Prior to 1894 there was substantially no demand for the lands except for the purpose of settlement and few sales in excessive quantities were made, but after that there were many such sales. (Stip. R. IV-1584, 1578, 1579.)

From 1884 until the lands were withdrawn from sale in 1903, they were sold at the best obtainable price and in quantities as great as the purchaser was willing to buy (Loring, R. V-2208-2223). The company did not require the applicants to state whether they desired the lands for purposes of actual settlement or not (Loring, R. V-2206). When the demand by timber buyers arose about 1894, the railroad company encouraged it (Loring, R. V-2223). The prices were determined at first by Mr. Loring, chief clerk of the land department of the company, and Mr. Andrews. But after the appointment of Mr. Mills as land agent in 1888 (Ante p. 81), the matter of fixing prices was subject to his supervision. These prices were always the highest obtainable and had no reference to those fixed in the grant (Loring, R. V-2216).

From 1894 to 1903 there were many sales of from 1000 to 20,000 acres to one purchaser at prices ranging from \$5.00 to \$40.00 per acre, and there

THE FACTS ESTABLISHED.

was one sale of 45,000 acres at \$7.00 per acre to a single purchaser (Stip., R. IV-1578). Up to 1903, the company had made approximately 5306 sales; of these sales 376 did and 4930 did not, exceed 160 acres to one purchaser, but the 376 sales covered 524,000 acres while the 4930 covered only 296,000 acres (Stip. R. IV-1578). Substantially all of the 524,000 acres were sold to persons who were not actual settlers and who purchased for purposes other than settlement and at prices in excess of \$2.50 per acre. About 478,000 acres of the 524,000 were sold since the year 1897, and approximately 370,000 of the 524,000 acres were sold to 38 purchasers in quantities exceeding 2000 acres to each. The following table is correct:

Total number of sales.....	820,000 acres
Sales not exceeding 160 acres	
to one person.....	296,000
Sales exceeding 160 acres to	
one person and at more	
than \$2.50 per acre.....	524,000
<hr/>	
Total acres sold.....	820,000 acres

Exhibit J, attached to the bill, correctly shows all sales made and their character as to quantity and price. Exhibit 4, attached to the joint answer, purporting to cover the same subject, differs from Exhibit J, but the difference is accounted for by the fact that Exhibit J is based upon executed con-

THE FACTS ESTABLISHED.

veyances while Exhibit 4 is based upon original sales. (Bill R. I-260, Ans. R. II-971, Stip. R. IV-1579.) It is conceded by the defendants that in making sales no attention was paid to the restrictions of the actual settlers provision in the grants of April 10, 1869, and May 4, 1870, and that if those restrictions had been called to the attention of the defendant railroad company at the time the sales were made it would have disregarded them (Fenton, R. V-2369).

COMPANY REFUSED TO SELL.

B. A. McAllaster, Land Commissioner, testified that between September, 1907, and July, 1912, about 10,000 applications to purchase quarter sections of the land at \$2.50 per acre were made to the company and refused (McAllaster, R. IV-1959).

It is stipulated that there were four thousand such applicants between January 1, 1903, and February 14, 1907. In some instances the applicants claimed to be actual settlers upon the lands applied for and in all other cases that they desired the lands for actual settlement. Each applicant stated at the time that he made his application that he was able to pay \$2.50 per acre for the lands applied for and in some instances the tender was actually made (Stip., R. IV-1581).

The refusal of the company to sell was based on the stated claim that the lands were essentially tim-

THE FACTS ESTABLISHED.

ber lands and unsuitable for any other purpose. On January 1, 1903, the company withdrew from sale all the unsold lands (Stip., R. IV-1581).

Approximately 1,800,000 acres of the unsold lands are situated southerly from Eugene, Oregon, and constitute more than one-third in alternate sections, of all lands lying within approximately twenty miles on each side of the company's railroad between that point and the southern boundary of the state (Stip., R. IV-1581).

CHANGE IN FORM OF DEEDS.

Prior to 1892 the Oregon and California Railroad Company used a form of deed containing covenants of warranty (Govt. Ex. 129, R XI-5765; Minutes, p. 248; Singer, R. V-2508). The use of those deeds was discontinued after that time by order of the board of directors and a form adopted which did not contain warranties (Stip., R. IV-1577). The new form of deed, one witness said, was adopted for the purpose of standardizing deed forms and denied that it was intended to anticipate any contention by the Government in this suit (Singer, R. V-2509).

The contracts and deeds executed by the defendant Oregon and California Railroad Company prior to (about) the year 1894 contained (substantially) the following reservation clause:

THE FACTS ESTABLISHED.

Reserving, however, a strip of land one hundred feet wide to be used by the Oregon and California Railroad Company for right of way or other railroad purposes, when the railroad of said Oregon and California Railroad Company or any of its branches is or shall be located upon the premises, and the right to use all water needed for the operating and repair of said railroad, and also reserving all claim of the United States to the same as mineral lands (Stip., R. IV-1587).

The words,

And also reserving all claim of the United States to the same as mineral lands
were stricken from the contracts and deeds executed by the company between (about) 1894 and 1902; and in contracts and deeds executed after that, the words,

And also reserving and excepting from said described premises so much thereof as may be mineral lands,
were substituted for the words which had been stricken out (Stip., R. IV-1587).

VALUE OF THE PROPERTY COVERED BY UNION TRUST COMPANY MORTGAGE.

The mortgage to the Union Trust Company covers, in addition to the unsold lands, 660 miles of railroad lines and other property of the Oregon and

THE FACTS ESTABLISHED.

California Railroad Company. This road was worth \$50,000 per mile at the time the mortgage was given and is worth more now (Koehler, R. IV-1903-4).

On this basis the property covered by the mortgage, outside of the granted lands, is worth \$33,000,000. The balance due on the mortgage is \$17,745,000 (Stip. R. IV-1575).

The Southern Pacific Company, guarantor of the mortgage deed is financially able to pay the debt secured (Koehler, R. IV-1908).

POSSESSION OF GRANTED LANDS.

The only occupation or possession asserted by the railroad company has been through the cruising and examination of lands, the payment of taxes, contests in land office to defend title, maintenance of fire patrols, the leasing of lands (the highest acreage of leases being 24,671.02 acres), (McAllaster, R. IV-1980, 1984; Eberlein, R. V-2288), issuance of deeds, inspection of reported trespasses and protection of the lands from depredation and waste (Loring, R. V-2203).

REPORTS MADE TO BUREAU OF INTERIOR DEPARTMENT.

The railroad company made reports to a bureau of the Interior Department between 1879 and 1903. These reports show the maximum and average selling price of the lands to be in some instances in excess of \$2.50 an acre (Stip., R. IV-1590, *et seq.*) The

THE FACTS ESTABLISHED.

Bureau Chief transmitted reports annually to the Secretary of the Interior (Stip., R. IV-1612) who, in turn, transmitted them to the President and by him they were laid before Congress where they were referred to appropriate committees and printed as executive documents (Stip., R. IV-1612). It is agreed that the use made by Congress of these reports may be shown by reference to the Congressional Globe and Record and other Congressional reports (Stip., R. IV-1622).

APPROVAL OF TITLE TO BASE LAND.

Certain of the lands sold by the company in violation of the grant as to price and quantity were subsequently deeded by the purchasers to the Government in lieu of other lands received from the Government, in accordance with the provisions of an act approved June 4, 1897. The lands thus deeded are called base lands; those received in their place, lieu lands. Clerks in the Interior Department examined the title to the base lands. At the time of the examinations they had no knowledge of the act of April 10, 1869, or May 4, 1870. The result of their examinations was approved *pro forma* by the Chief of the Forest Lieu Division, Commissioner of the General Land Office and Secretary of the Interior (Stip., R. IV-1885).

THE FACTS ESTABLISHED.

FREE TRANSPORTATION OF PASSENGERS AND FREIGHT FOR
THE GOVERNMENT.

Defendant shows, by Exhibit 288, that the railroad company furnished to the government free transportation for passengers and freight between 1906 and 1910 of the value of \$315,828,34 (R. XIII-6835). The exhibit shows the amount supplied each year. The volume of free transportation from 1872 to 1906 was approximately the same by years as shown by the exhibit except that prior to 1887 there were few shipments (Sherburn, R. V-2412). The government paid for all transportation of mails on rates based upon weight (Sherburn, R. V-2413). It was also testified that the United States continued to make requests for free transportation up to the date of taking testimony in this case (Sherburne, R. V-2412).

TAXES PAID.

Defendant showed by Mr. Eddy, tax agent of the Southern Pacific Company and Oregon and California Company, that the total amount of taxes paid on the lands was \$2,434,843.33, of which \$1,637,601.69 has been paid since 1905 (Eddy, R. V-2567). From 1874 to 1907 the total amount of taxes paid was \$1,208,833.86 or 58 cents per acre on 2,073,415 acres then owned, and from 1908 to 1911 taxes paid were \$1,266,009.47 or 57 cents an acre on 2,109,927 acres owned during that period. The av-

DISPUTED FACTS.

erage tax paid based on the total grant of 3,182,-169.57 acres is 76 cents per acre, of which amount 38 cents per acre has been paid since the institution of this suit. (Eddy, R. V-2569.)

USES OF CONGRESSIONAL RECORDS.

All committee reports and debates in Congress, appearing in the Congressional Globe or Congressional Record, and all other proceedings in Congress published in recognized official reports relating to the enactments of the acts of July 25, 1866; June 25, 1868; April 10, 1869; May 4, 1870; January 31, 1885, and September 29, 1890, are treated as received in evidence subject to the defendants' right to object on the ground of incompetency, irrelevancy and immateriality, except that the objection of incompetency shall not go to the identification of the documents (Stip., R. IV-1623).

DISPUTED FACTS.

The defendants produced the testimony of about 33 witnesses for the purpose of showing that the lands in question are chiefly timbered lands and unfit for actual settlement. To the testimony of each witness upon this subject the complainant objected as incompetent, irrelevant and immaterial. (See Appendix D for page on which testimony of each commences.)

DISPUTED FACTS.

Many of the witnesses called were sent upon the land by the defendants for the purpose of gathering testimony; a few before, many after, the suit was instituted, but all subsequent to the beginning of the agitation for the recovery of the lands. Appendix D contains a table showing (a) name of witness called, his occupation and page of record where his testimony appears; (b) county wherein land testified about is located; (c) area within the county covered by testimony of witnesses; (d) condition of land in natural state; (e) percentage of lands suitable to tillage in natural state and after they have been cleared; (f) suitable to settlement in tracts of a quarter section.

A very small proportion of the witnesses, called by the defendants upon this question, were farmers, most of them were timber men (Appendix D).

Upon the same subject a number of exhibits were also introduced by the defendants (R. VIV-7309, 7310, 7343, 7345). These exhibits consist of written statements made by land cruisers, none of them sworn to, except those prepared by Rees, McLennan, Bruce and McLeod. They show that the land covered by them is largely timbered, but when cleared will be fit for grazing and agricultural purposes. We give a summary of the exhibits in Appendix D.

DISPUTED FACTS.

The percentage of the lands suitable for agricultural purposes ranges from four to sixty per cent in the estimation of the witnesses called by the defendants.

The defendants also offered several exhibits based upon the tax records in the various counties in which the lands are located, for the purpose of showing the acreage of tillable and non-tillable lands. These exhibits refer to the lands actually under cultivation, but do not include those that are, or might be, rendered susceptible to cultivation (Galloway, R. VIII-4263).

Many other exhibits were introduced by the defendants which they claimed bore upon the character of the lands. These exhibits consist, generally speaking, of maps, plats, bulletins, and like documents. They are scattered throughout the printed record. In their effect they do not differ materially from the other exhibits. It would, therefore, serve no useful purpose to attempt a more specific reference to them here.

COMPLAINANTS' WITNESSES ON CHARACTER OF LAND.

The complainants presented 70 witnesses who testified with respect to the land covered by the testimony of the defendants' witnesses. They were chiefly farmers who lived in the neighborhood of the land and were thoroughly familiar with it. There

DISPUTED FACTS.

were 48 of this class. The remainder was made up of timber men and other persons who knew the lands. Forty-five of those who testified said that all of the lands to which their testimony related was capable of settlement; thirteen said that 75 per cent; two that over 80, but under 100 per cent, and the balance fixed it at from 33 to 75 per cent. A statement giving the names of these witnesses and an abstract of their testimony, similar to the one prepared with respect to the defendants' witnesses, is embodied in Appendix E.

OTHER TESTIMONY CONCERNING THE LANDS.

The witnesses for both the defendants and the Government testified with respect to other matters concerning the lands, besides those mentioned above. Here is a summary thereof:

DEFENDANTS' WITNESSES.

1. Value of timber from \$0.75 to \$2.50 per thousand feet board measure.
2. Quantity of timber on quarter section from 4,000,000 to 25,000,000 feet.
3. Cost of clearing from \$50.00 to \$500.00 per acre.
4. Lands acquired under homesteads in timber area generally abandoned, after which the lands passed to timber companies.

DISPUTED FACTS.

5. If the lands had been sold under terms of act of April 10, 1869, title would have passed eventually to timber companies.

GOVERNMENT'S WITNESSES.

1. Value of timber from 50 cents to \$1.00 per thousand feet.

2. Best timber in grant sold. Timber light in many places. Many open places. [Only a portion of the southern part of the grant is timbered].

3. Cost of clearing \$40.00 to \$50.00 per acre. Settler does not hire clearing done but by char-pitting removes the timber by his own labor.

4. Few abandoned homesteads in timbered area.

5. Sale of granted lands in large quantities, to others than actual settlers and withdrawal of lands from market, retarded development of communities in vicinity of the lands.

THE ALLEGED INFLUENCE WHICH BROUGHT ABOUT THE
PASSAGE OF THE MEMORIAL OF FEBRUARY 14, 1907, BY
THE LEGISLATURE OF OREGON.

Messrs. Eberlein and Booth testified upon this point. Mr. Eberlein said that, in his opinion, the memorial was instigated by influential politicians for personal interests, but admitted that he had no personal knowledge on the subject (Eberlein, R. V-2378). He attributed the origin of the memorial

ARGUMENT.

largely to the Booth-Kelly Lumber Company and Booth. Booth denied this responsibility (Booth, R. V-2612). In addition Mr. Dixon said that he appeared before the Public Lands Committee of the House of Representatives and insisted that an amendment be made to the Congressional joint resolution, authorizing the bringing of this suit, to the effect that the titles of all purchasers from the railroad company be confirmed, or else that the resolution should be defeated (Dixon, R. VI-2703).

THE DECREE.

The case was submitted upon the pleadings and the evidence. The court dismissed the cross-complaints and petitions in intervention for want of equity, decreed the unsold lands forfeited, quieted the title thereto in the Government, gave other relief and enjoined the defendants from doing certain acts (R. III-1296).

THE APPEAL.

The defendants, cross-complainants and interveners appealed.

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(An outline of the argument is given in the index (Ante, p. 1).

ARGUMENT—PROPOSITION I.

I.

OPINION OF THE COURT.

The points raised by the demurrers to the bill, the cross-complaints, and the petitions in intervention, covered substantially the entire field of discussion. The trial court, in a written opinion, met and disposed of each (186 Fed. 781).

II.

VESTING OF THE GRANT OF JULY 25, 1866.

Under which will be discussed the question whether the grant under the act of July 25, 1866, is subject to the provisions of the act of April 10, 1869, restricting the manner in which the granted lands might be sold.

The amendatory act of April 10, 1869, contains the provision on which this action is based. It reads:

And provided further that the lands granted by the act aforesaid (meaning the act of 1866) shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding \$2.50 per acre.

It is, therefore, of the first importance to show that the grant in question was received subject to that provision.

The act of July 25, 1866, required the company designated by the Legislature of Oregon as compe-

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tent to receive the grant to file its acceptance of the act within one year from the date thereof. The East Side Company was organized in April, 1867, and designated in October, 1868. Obviously it could not file its assent within one year from the date of the granting act, consequently it applied to Congress for an extension of time. (Ante, p. 50.)

On April 10, 1869, Congress amended the act of July 25, 1866, as above stated, and among its provisions is one extending the time for filing the assent required by that act to one year from the date of the amendatory act.

On June 30, 1869, the East Side Company filed its assent to the act of 1866 in these words:

Accept all the provisions, rights, privileges and franchises of said act of July 25, 1866, and all acts amendatory thereof and upon the conditions therein specified, and do hereby give our assent and the assent of such company thereto. (Ante, p. 54.)

Under these circumstances it would seem conclusive that the grant was received subject to the provisions of the amendatory act of 1869. Defendants contend, however, that in reaching this conclusion sufficient effect is not given to the words, "that there be and hereby is granted to said company," appearing in section two of the act of 1866. They

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say these words import a present vesting of the estate and that under the doctrine of relation the estate must be treated as having taken effect in the East Side Company on the date of the act of July 25, 1866. The Government denies this.

(a) The doctrine of relation does not apply.

All railroad grants import a present vesting of the estate, but in nearly every one something had to be done after the making of the grant before the estate could actually vest. This gave rise to many disputes in the early administration of the grants, as to when the grants vested, and it became necessary for the courts to establish a rule by which the disputes could be settled. At common law a grant to one not in existence, or not qualified to take, or of lands not identified, at the time of the grant was void for uncertainty. But the Supreme Court held that Congress, being a law making body, was not bound by the common law and could create a valid grant by methods even prohibited by it. (*Rutherford v. Greene*, 15 U. S. 196; *Lessieur v. Price*, 53 U. S. 59). Consequently, it is settled that such grants are valid. But when do they become effective? That depends upon circumstances. If the grantee is capable of taking at the time of the grant, but it is necessary to do something to identify the lands, as for instance, to locate the line of road, the grant does not vest until the identification has been

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made. In contemplation of law, however, it relates back to the date of the granting act. This rule has been adopted for the protection of the grantee against claims of third parties.

In *Barden v. Northern Pacific*, 154 U. S. 288, 313, it was said:

The title attached as of the date of the grant so as to cut off intervening claimants. In that sense the grant was a present one.”

In *Van Wyck v. Knevals*, 106 U. S. 360, it was said:

When that route is thus established, the grant takes effect upon the sections by relation as to the date of the act of Congress. In that sense we say that the grant is one *in praesenti*. It cuts off all claims other than those mentioned, to any portion of the lands from the date of the act and passes the title as fully as though the sections had then been capable of identification.

In *United States v. Detroit T. & L. Co.*, 200 U. S. 321, 334, Mr. Justice Brewer, speaking for the court, said:

By the doctrine of relation the patents (under the timber and stone act), when issued, became operative as of the dates of the entries. It is true that this doctrine is but a fiction of

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law, but it is a fiction resorted to whenever justice requires. It is that principle by which an act done at one time, is considered to have been done at some antecedent time. It is a doctrine of frequent application designed to promote justice. Thus a sheriff's deed takes effect, not of its date, but at the time when the lien of the judgment attached. The ordinary railroad land grants have been grants *in praesenti*, and under them the title has been adjudged to pass not at the completion of the road, but at the date of the grant.

There are many cases like these, but there is none in which it is held that the vesting of the title goes back to a date before the grantee came into existence, or before it was qualified to take.

In *Hall v. Russell*, 101 U. S. 503, it was said:

There cannot be a grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee. If, then, the law making the grant indicates a future grantee and not a present one, the grant will take effect in the future and not presently.

Any other rule, it seems to us, would lead to an absurdity. Take the case at bar; to say that the grant to the East Side Company took effect in that company as of the date of the act of July 25, 1866,

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would be equivalent to saying that it took effect before the company was qualified by designation to receive it, even before the company had come into being. This proves too much.

There are other cogent reasons for saying the grant is subject to the provisions of the amendatory act of April, 1869.

(b) Assent was necessary.

The company was incapable of receiving or accepting the grant until it had been designated by the Legislature. The provisions of the act of 1866 make this plain. Section 1 of the act provides that "such company organized under the laws of Oregon as the Legislature of said state shall hereafter designate" shall construct the Oregon portion of the road described in the act. Section 6 provides "that the said companies (which includes the Oregon company) shall file their assent to this act in the Department of the Interior within one year after the passage hereof." Section 8 provides "that in case the said companies shall fail to comply with the terms and conditions required, namely, by not filing their assent thereto, as provided in Section 6 of this act, or by not complying with the same as provided in said section, this act shall be null and void." (Ante, p. 39.) The company regarded this assent as essential for it applied to Congress for an extension of time within which to file it. (Ante, p. 50.) Congress

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took the application under consideration and afterwards granted it in the amendatory act of 1869.

Defendants suggest that they had given their assent by commencing the construction of the road long before the passage of the amendatory act of 1869. Assent could not be given in that way. The act requires the assent to be filed in the Department of the Interior. An oral assent cannot be filed. (Words and Phrases, Vol. 3, p. 2764, Bouvier's Law Dictionary, p. 660.) This we may remark, in passing, is in accordance with the construction adopted by the company for, as we have seen, it filed a written assent.

(c) **The legal function of an assent.**

An assent implies an acceptance of a proposal. In *State v. B. & O. R. R. Co.*, 12 Gill & J. 399, 433, the court held that where an act authorized the construction of a railroad and required it to assent to certain provisions of the law, the term is one peculiarly appropriate to contracts, and then observed:

The assent of the company was essential to give to the law a binding and obligatory force; the principle being well settled that an act or charter of incorporation is nothing more than an offer until consummated by acceptance.

(*Canal Company v. B. & O.*, 4 Gill & J. 1, 130; *Fuller v. Kemp*, 16 N. Y. S. 158, 160; *Baker v. Johnson County*, 37 Iowa, 186, 189.)

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The first act required by Congress from the grantee company was the filing of its assent. Until that had been done it could not be known that the company accepted the grant upon the conditions named. It was the means provided by Congress for evidencing the meeting of the minds of the grantor and grantee. The grant was an offer and, of course, could not become effective until accepted. *Rogers v. Railroad Company*, 45 Mich. 460, 468, is a case in point. Congress by the act of June 3, 1856, granted lands to Michigan to aid in the construction of railroads. The Legislature of the state in turn granted lands to certain railroad companies by an act which said, *inter alia*, that the lands “are hereby disposed of, granted to, conferred upon and vested in” the railroad companies named. It also provided for an acceptance and said, “in such acceptance each of said companies shall severally assent and agree to the provisions and requirements of this act, which acceptance shall be filed in the office of the Secretary of State of Michigan within sixty days from the passage of this act.” The railroad companies did not file an acceptance, and the court was asked to determine the effect of the failure. It said:

So far as the claim is concerned that these companies without acceptance obtained titles in fee, we think it has no legal basis.
Again,

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This acceptance was the only act whereby any of these companies were brought into contract relations with the state at all. The law did not assume to force the grant upon any company, and the contract could not bind either party until both assented to the same agreements and conditions.

(To the same effect are: 9 A. & E. Enc. of Law, 2 Ed. 161, and cases cited; Herbert, et al. v. Herbert, 1 Ill. 278, 282; Woodbury, et al. v. Fisher, et al., 20 Ind. 387, 389; Bremmerman, et al. v. Jennings, et al., 100 Ind. 253, 256; Maynard v. Maynard, 10 Mass. 455, 457; Jackson v. Phipps, 12 Johns. N. Y. 418, 421; Comer v. Baldwin, 16 Minn. 172, 175; Owens v. Miller, 29 Md. 144, 159; M'Gehee v. White, 31 Miss. 41, 46; Corbett v. Norcross, 35 N. H. 99, 110; Moore v. Flynn, 135 Ill. 74, 79.)

(d) Acceptance of the grant in the manner provided by the granting act was essential.

It is admitted by the defendants that the East Side Company did not *file* its assent within a year after the passage of the act of 1866, but it is contended by them that it had given its assent in some other way. Even if this be true, it would not be sufficient. The act of 1866 was not only a conveyance, but also a law. In *Schulenberg v. Harriman*, 88 U. S. 44, Mr. Justice Field, speaking for the court, said:

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A legislative grant operates as a law as well as a transfer of the property, and has such force as the intent of the Legislature requires. (Missouri v. Kansas Pacific, 97 U. S. 491; United States v. Southern Pacific, 146 U. S. 570.)

Therefore, the manner in which the assent was to be given, having been fixed by statute, could not be disregarded without violating the law.

United States Bank v. Dandridge, 12 Wheat., 64, relied upon by defendants, is not opposed to this view. That case decided that acts of a corporation are not “invalid merely from the omission to have them reduced to writing,” but added,

Unless the statute creating it makes such writing indispensable as evidence or to give them obligatory force. *If the statute imposes such a restriction, it must be obeyed.* (p. 69.)
Again,

If, in the present case, the statute had prescribed that nothing but a written vote on record should be deemed an approval of the bond, or that the cashier should not be deemed for any purpose in office until such approval, the consequences contended for would have followed. His acts would have been *utterly void* and any unrecorded vote of approval nugatory. (p. 87.) (Italics ours.)

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St. Paul, etc., Railway Co. v. Greenalgh, 139 U. S., 19, is another case which defendants claim supports their contention. The question decided there arose in this wise: Congress had granted lands to the State of Minnesota to aid in the construction of railroads. One of the roads failed to complete construction within the time prescribed. Congress extended the time but upon conditions

That all rights of actual settlers and their grantees who have heretofore in good faith entered upon and actually resided on any of said lands prior to the passage of this act, or who otherwise have legal rights in any of such lands, shall be saved and secured to such settlers or other such persons in all respects the same as if said lands had never been granted to aid in the construction of the said lines of railroad.

The act required the railroad company to file an acceptance of these conditions. There was no evidence that it had done so, but it had received all the benefits of the act, and in view of this the court held:

It will be considered, in the absence of proof to the contrary, as having in fact accepted the conditions imposed, and relinquished all claim to the lands thus settled upon and occupied.

Because,

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It would be in the highest degree inequitable to allow the company to have all the benefits of the extension of time to complete its road, so as to void forfeiture of its privileges and franchises, without at the same time holding it to the conditions affecting the rights of settlers upon the lands of the company, in consideration of which the extension was made.

The decision was in effect that where the beneficiaries of a grant obtain all the benefits thereof they are estopped from denying that they had assented to the terms of the grant—had assented how? Clearly in the manner provided by the act. That case gives no countenance to the contention of defendants.

(e) **Mutual Construction of Provisions requiring Filing of an Assent.**

If an instrument is of doubtful meaning the construction given it by the parties themselves, as shown by their acts and omissions, particularly at or about the time of its execution will be deemed to be the true one, unless the contrary be clearly shown. (*Irwin v. United States*, 57 U. S. 513; *Dakin v. Savage*, 172 Mass. 23.)

Considering the conduct of the parties here, how did they construe the provision with respect to the filing of the assent?

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The East Side Company made application to Congress for an extension of the time within which to file its assent. When this application was pending Senator Williams of Oregon, favoring the extension of time, procured from the Secretary of the Interior his views on the subject. After setting forth the history of the subject in his letter, the Secretary said:

I have the honor to state that as the matter now stands that the grant, so far as the portion in Oregon is concerned, has lapsed * * * and some legislation of Congress is necessary to revive the grant for the Oregon portion of the road. The proposed bill, if it becomes a law, will in my opinion accomplish that purpose.

(Ante, p. 52.)

The bill referred to was what subsequently became the amendatory act of 1869. Congress, when it passed that act extending the time for filing the assent, must have deemed it important, for it will not do to say that it purposely did an unnecessary thing.

During the same time the West Side Company proceeded on the assumption that assent was necessary; it resisted the extension on the theory that if it was not granted the East Side Company could acquire no rights under the grant of 1866. We have

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then the East Side Company, the West Side Company, the Congress of the United States and the Secretary of the Interior all agreeing in the view that a written assent had to be filed within the time fixed in the grant. Shall the East Side Company be now heard to say that they were all mistaken. Shall it be heard to say that the requirement of an act passed at its request, and largely through its procurement, was unnecessary and does not mean what it says.

(f) Is the Provision with respect to the Filing of an Assent a Condition Precedent or Subsequent?

It was urged by defendants that the filing of an assent was a condition subsequent. This they based upon the 8th provision of the act of 1866 to the effect that upon failure to file the assent the lands unpatented "shall revert" to the United States. The phrase "shall revert" they say implies that the title vested in the grantee before the assent was given. This assumes too much. That the title passed out of the United States the moment the act was passed may be conceded, but this is far from admitting that at the same time it took lodgement in the company. It became in the language of the Supreme Court "a float" (*Railroad v. Freemont*, 76 U. S. 89) and did not and could not find a resting place until the companies, contemplated by the granting act, had qualified themselves to become its recipient.

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When we consider the function of an assent it is obvious that the giving of it was intended to precede the vesting of the estate. In *Finlay v. King*, 3 Pet. 346, 374, it was said:

There are no technical appropriate words which always determine whether a devise be on a condition precedent or subsequent * * * if the language of the particular clause, or of the whole will, show that the act on which the estate depends, must be performed before the estate can vest, the condition is, of course, precedent; and unless it be performed the devisee can take nothing.

Whether a condition in a deed is precedent or subsequent is always a question of the intention of the parties.

(*Rannels v. Rowe*, 145 Fed. 296; *Jones v. C. & O. R. R. Co.*, 14 W. Va. 514; *Carloss v. Oxford*, 72 Ark. 310; *Washburn on Real Property*, Vol. 2, Sec. 941.)

No one can doubt, it seems to us, after reading the act of 1866, that it was the intention of Congress that the assent should precede the vesting of the estate.

(g) The title was in the **East Side Company** until it renounced it in 1870.

Congress empowered the Legislative Assembly of Oregon to designate a company organized under

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the laws of Oregon to be the recipient of the grant. Pursuant to this power the Assembly designated the West Side Company. This exercise of the power exhausted it (31 Cyc. 1053). When, therefore, the Legislature attempted to designate the East Side Company in October, 1868, as a substitute for the West Side Company it was without power to do so. From this it follows that the East Side Company was not legally designated before the passage of the Act of 1869 and therefore did not acquire any rights, under the grant, prior to that time.

If it be urged that the West Side Company was not completely organized at the time of its designation, that would not be sufficient to render nugatory the designation. It had taken steps to become a corporation prior to its designation, completed its organization in May, 1867, filed its assent in the following July, and was subsequently recognized by the Department of the Interior (Ante, p. 42, *et seq.*) Thus it became qualified to receive the grant before its designation had been revoked and before the East Side Company had been selected.

In *Rotch's Wharf Company v. Judd* (108 Mass. 227) it was contended that a deed to a corporation was void because the corporation was not organized at the date of the deed. The Court held that upon the completion of its organization it was competent to accept the deed and that it had done so.

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Assuming that the West Side Company did not receive the grant because the company had not been properly organized, how does the East Side Company stand in that respect.

In *Holladay v. Elliott*, 8 Ore. 85-91, we read:

In this case the attempted organization of the O. C. R. R. Co. (the East Side Company) amounted to nothing. It was absolutely void. Nor did the joint resolution of the Legislative Assembly, adopted October 20, 1868, recognizing this corporation as the one entitled to receive the land granted by Act of Congress, to aid in the construction of a railroad, cure the inherent defects of its organization. It had no power to legally transact any business, nor to accept or hold the lands so granted.

The Court in that case was construing a state statute and its decision is binding on this court.

Before this the company had become involved in litigation with respect to the right to use its name, Oregon Central Railroad Company, the contention being that the West Side Company had appropriated that name before the East Side Company was organized. (*Newby v. Oregon Central Railroad Company, et al.*, Fed. Cas. 10144.)

Indeed the East Side Company may be said to have recognized its own invalidity, for on March 17, 1870, its promoters formed a new corporation under

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the name of the Oregon and California Railroad Company, defendant herein. On the 29th of March following, a general conveyance was made by the East Side Company of all its property and franchises to the new corporation, and on the same day, the East Side Company was dissolved (Ante, p. 61). From the foregoing it follows that the East Side Company was not qualified to receive the grant prior to 1869.

(h) **Oregon and California Railroad Company Estopped.**

The East Side Company, predecessor of the Oregon and California Company, as we have seen, requested Congress to pass the Act of 1869. On June 8, 1869, its board of directors adopted a resolution wherein it said:

This company, the Oregon Central Railroad of Salem, Oregon, * * * do hereby accept all the provisions, rights, privileges and franchises of such act of July 25, 1866, * * * and of all acts amendatory thereof upon the conditions therein specified and do hereby give our assent and the assent of such company thereto (Ante, p. 53).

This necessarily included the Act of 1869. On July 30, same year, a copy of this resolution was filed in the office of the Secretary of the Interior.

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March 17, 1870, the Oregon and California Railroad Company, in its articles of incorporation, recognized the binding force of the Act of 1869. March 29, 1870, the East Side Company conveyed all its property and franchises to the new corporation and was formally dissolved. April 4, following, the new corporation, through its board of directors, adopted a resolution assenting to the terms of the act of 1866 "and amendments thereto," which necessarily included the Act of 1869. On April 28, 1870, the new corporation filed in the office of the Secretary of the Interior certified copies of its assent and of the general conveyances from the East Side Company and from that time has been recognized by the Department of the Interior as the *successor* of the East Side Company. (Ante, p. 61).

In connection with the foregoing, consider that on January 29, 1869, the Secretary of the Interior decided that "the grant, so far as the road in Oregon is concerned, has lapsed * * * and some legislation by Congress is necessary to revive the grant," and, he added, "the proposed bill," meaning the one which eventually became the amendatory Act of 1869, "will, in my opinion, accomplish that purpose." (Ante, p. 51.) From this it is clear that the Department of the Interior would not have recognized the East Side Company as entitled to the grant if the Act of 1869 had not been passed, or, if passed, the company had not assented to it. By

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assenting, the company received the benefits of the act without contest. May it now be heard to say that the assent was unnecessary and therefore not binding upon it? We think not. (Bigelow on Estoppel, pp. 354-364; Spriggs v. Bank, 10 Pet. 257, 265; Goddard v. Dakin, 51 Mass. 94; Johnson v. Thompson, 129 Mass. 398; Parkinson v. Sherman, 74 N. Y. 88.)

In *State v. Portland General Electric Co.*, 95 Pac., 722, 732, the doctrine of estoppel was applied to facts quite analagous to those in the case at bar. The Court held that when a corporate franchise is based upon several enactments, some passed at one time and some at another, and the later ones impose additional terms and conditions, which the beneficiary of the franchise acquiesces in or recognizes, it, the beneficiary, will be estopped from contending that it became vested with the franchise prior to, and therefore independent of, the later enactments. In that case acquiescences was established only by implication; in this case by written declarations.

Is there anything in the case of *Bybee v. O. & C. R. R. Co.*, 139 U. S. 663, 684, against this? In that case the company secured nothing from Bybee through its recognition of his alleged title. Estoppel rests upon equitable grounds. There was no equity estopping the company from denying his right.

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(i) In the act of July 25, 1866, Congress reserved the power to amend the grant, and afterwards exercised this power at the request of the East Side Company.

Section 12 of the Act of July 25, 1866, reads:

“That Congress may at any time, having due regard for the rights of said California and Oregon Railroad Companies, add to, alter, amend, or repeal this act.

Pursuant to this, Congress passed the amendatory Act of April 10, 1869. Did the East Side Company have any right with respect to which Congress was bound to have “due regard” at the time of the passage of that act? We have already shown that it had not. But whether it had or not, the East Side Company cannot now be heard to say that the amendment is not binding. It applied to Congress and represented that it had no rights under the grant and could acquire none until Congress permitted it to do so, by extending the time for filing its assent. The amendment was, therefore, consented to by the company.

With the consent of the corporation, the legislature may make any change in the charter. This consent may be shown by the corporation asking for the amendment, or expressly accepting one made without request, or by acting upon or acquiescing in one enacted without request. (8 Cyc. 964.)

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CERTAIN CONTENTIONS BY DEFENDANTS NOT NOTICED
ABOVE.

(1) On June 25, 1868 (Ante, p. 47), Congress passed an act extending the time for the completion of the first twenty miles of the road from one year to eighteen months. Defendants urge that by this act Congress waived the filing of the assent required by the act of July 25, 1866. There is nothing in its terms to warrant such a contention.

(2) It was also insisted that the provisions of the amendatory act of 1869, which reads, "that nothing herein shall impair any rights heretofore acquired by any railroad company under said act," shows an intention on the part of Congress not to insist upon the other provision requiring the lands to be sold to actual settlers in limited quantities. Of course, the provision has no such meaning. At the time of the passage of the amendatory act there was a controversy between the West Side Company and the East Side Company, as we have already seen. Congress did not desire to settle that controversy and, hence, incorporated the provision in question. To argue that this provision nullifies the one with respect to the sale of the lands, is pushing the contention a little bit too far.

(3) It was also contended that in the bills of complaint and stipulations of fact in certain former suits, involving the grant of 1866, the Attorney-Gen-

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eral recognized the East Side Company as having become vested with the grant prior to the act of 1869. These papers do not appear in the printed record, but if they should be referred to they will show that the question as to whether the grant of 1866 was subject to the provisions of the act of 1869, was not involved in the slightest degree. The stipulations were prepared by the attorneys for the defendants and principally upon the stationery of one of the attorneys for the defendants in the case at bar. The bills of complaint did not allege the time when the Oregon Central Railroad became entitled to the benefits of the act of 1866; they simply alleged that it did not become entitled to them. But the attorneys for defendants, in preparing the stipulations, inserted therein the statement "and prior to the year 1869 the said company duly became entitled to all the benefits, privileges and grants in the State of Oregon mentioned in or offered by the said act of Congress."

These stipulations were made many years ago, when there was nothing to direct the attention of the Attorney-General to the importance of the exact time of the vesting of the grant in the East Side Company. The Attorney-General did not have in mind, and could not have had in mind, the question of the validity or binding force of the provisions of the act of 1869. The attorneys for the railroad company have had that question very seriously in mind

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for many years. Besides each of these stipulations is expressly limited to "the purposes of this suit." They have no weight in the case at bar.

(4) Another contention urged was, that the filing of an assent by either the California or the Oregon company was a sufficient compliance with the act.

The language of the act refutes this. Section 6 says, "that the said companies shall file *their* assent to this act." Section 8 provides "that in case the said companies shall fail to comply with the terms and conditions required, namely, by not filing *their* assent thereto, * * * this act shall be null and void." (Ante, p. 40.) "Their assent" does not mean its assent.

(5) Another contention was that the Oregon and California Railroad Company had acquired the rights of the West Side Company in the East Side Company grant, by the general conveyances of the West Side Company on October 6, 1880. This is on the assumption that the West Side Company had some right in the East Side grant, but the suggestion is completely answered by the fact that the West Side Company waived all claim to the East Side grant before it had earned an acre of land thereunder, and in lieu thereof applied applied for, received and accepted the West Side grant (Ante, p. 55).

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We submit in conclusion upon this point that the East Side Company must be held to have received the grant subject to all the obligations and restrictions of the act of April 10, 1869.

III.

CONSTRUCTION OF ACTUAL SETTLERS' PROVISION.

Under which will be discussed the meaning and legal effect of the provision of the act of April 10, 1869, restricting the manner in which the granted lands might be sold; the Government contending that it is a condition subsequent, the defendants contending that it is an "unenforceable, directive, regulative covenant," and the cross-complainants and intervenors contending that it establishes a method by which individual citizens may acquire an enforceable right to purchase the lands.

Before entering upon an examination of the provisions of the act of 1869, we think it proper to recall to the mind of the court certain pertinent rules of construction.

RULES OF CONSTRUCTION.

(1) We have heretofore alluded to the principle that an act of Congress making a grant is more than a mere conveyance. It is a law as well. An additional word upon this topic may not be amiss. In *Missouri, etc., R. Co. v. Kansas Pacific*, 97 U. S. 491, 497, it was said:

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It is always to be borne in mind, in construing a Congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress.

(*Schulenberg v. Harriman*, 21 Wall. 44; *Hall v. Russell*, 101 U. S. 503; *Winona v. Barney*, 113 U. S. 618; *Kansas, etc., v. Dunmeyer*, 113 U. S. 629; *United States v. Southern Pacific*, 146 U. S. 570; *St. Paul, etc., v. Greenalgh*, 26 Fed. 563.)

The act in question being a law must be enforced as written, if possible. It should not be impaired or minimized in any wise by construction. All parts should be given effect, unless they be in irreconcilable conflict.

(2) In construing public grants, such as the one under consideration, all doubts must be resolved in favor of the grantor.

In *Winona v. Barney*, 113 U. S. 618, 625, it was said that public grants should

receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance.

In *Oates v. National Bank*, 100 U. S. 239, 244, it was observed,

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We ought rather, adopting the language of Lord Hale, to be “curious and subtle to invent reasons and means” to carry out the clear intent of the lawmaking power when thus expressed.

The law favors that construction which will give effect to every part. In *Bird v. United States*, 187 U. S. 118, 124, it was said:

There is a presumption against a construction which would render a statute ineffective or inefficient, or which would cause grave public injury or even inconvenience.

In 26 Am. & E. Ency. of Law, Vol. 26, p. 618, it is said:

That construction is favored which gives effect to every clause and every part of the statute, thus producing a consistent and harmonious whole. A construction which would leave without effect any part of the language used should be rejected if an interpretation can be found which will give it effect.

The rule for which we contend is reasonable. When the good of the public comes into conflict with the good of the individual the latter must yield. But it is not necessary for us to press the rule that far in this case; because, as we view it, the terms of the grant are plain. If the rule is to have any application here it would be to prevent the resolving

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of doubts against the Government. An enforcement of the clear meaning of the statute is all we ask for.

(3) The principle applicable to private conveyances, that forfeitures are disfavored by law and should be avoided wherever possible, has no application. (*Rutherford v. Greene*, 15 U. S. 196; *Wilkinson v. Leland*, 27 U. S. 627, 662; *Rice v. Railroad Company*, 66 U. S. 358; *Schulenberg v. Harriman*, 88 U. S. 44; *Missouri v. Kansas*, 97 U. S. 491, 497; *St. Paul v. Northern Pacific*, 139 U. S. 1.)

(4) The language of the act must be permitted to control, unless the plain meaning thereof leads to results so absurd as to force the conviction that Congress could not have intended them.

In *United States v. Goldenberg*, 168 U. S. 95, 102, it is said:

The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and rules of grammar. The courts have no function of legislation and simply seek to ascertain the will of the legislator.

In *Kohlsaat v. Murphy*, 96 U. S. 153, 160, we read:

Whenever the intention of the Legislature can be discovered from the words employed, in

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view of the subject matter and the surrounding circumstances, it ought to prevail, unless it lead to absurd and irrational conclusions, which should never be imputed to the Legislature except when the language employed will admit of no other signification.

(5) Rules of statutory construction are employed to resolve, but never to create, doubts. (Hamilton v. Rathbone, 175 U. S. 414; McCluskey v. Cromwell, 11 N. Y. 601; Lewis' Sutherland Statutory Construction, Vol. 2, pp. 698-702, and cases cited.)

Having in mind the foregoing principles, we proceed to a consideration of the act of 1869.

First. THE LANGUAGE OF THE PROVISION.

For the purpose of bringing again to the attention of the court the plain, unmistakable language of the proviso of the amendatory act of 1869, we quote it:

Provided further, that the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser and for a price not exceeding \$2.50 per acre.

Hereafter we shall speak of this proviso as the "actual settlers' provision." Nothing could be freer from doubt than the language of this provision.

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Congress made it as clear as words could, that it intended the granted lands to be sold to actual settlers, in quantities not exceeding 160 acres to one purchaser, and for a price not exceeding \$2.50 per acre.

DEFENDANTS' INTERPRETATION.

The defendants contend that the phrase "actual settlers" means settlers who *cultivate* the land, and that if the land is not susceptible of cultivation, the actual settlers provision does not apply. This is too narrow a view. To be a settler on land does not necessarily imply cultivation of the land. There are old settlers associations in almost every city in the West, composed of persons who never tilled a foot of the soil on which they had settled, yet they are actual settlers. No one would think of denying it. This is a matter of common knowledge and the court will take notice of it. Persons might settle upon these lands and use them for any purpose to which they were susceptible whether it be pasturing, growing an orchard or the cultivation of the soil for the purpose of raising grain. The test is actual settlement upon the land without reference to any other use that may be made of it. Congress desired to populate the country. That accomplished, it was willing to let the inhabitants select the uses to which they would put the lands.

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Moreover, when Congress desired to condition the enjoyment of land upon the cultivation thereof, it said so. In the preemption act of 1830 (4 Stat. 420) it conferred the bounty upon those who were in possession and *cultivated* a part of the land. In the act of 1841 (5 Stat. 543) the gift was made to those who inhabited and *improved* the land. In the act of 1850 (9 Stat. L. 496) it gave the land upon condition that the occupant continued to reside thereon and *cultivate* it. In the homestead act of 1862 it required actual settlement *and cultivation* (12 Stat. L. 302). "The essential conditions of a preemption are actual entry upon, residence in a dwelling and improvement and *cultivation* of a tract of land" (Donaldson's Public Domain, 214). Thus we see that the phrase "possession," "settlement" and "residence" were never understood by Congress to include cultivation. When it required cultivation it used the word "*cultivation*" in addition to the foregoing words. It did not use it in the act either of 1869 or 1870 which we are considering and, therefore, we are justified in concluding that it did not intend to require cultivation.

It is suggested that actual settlers within the meaning of the act contemplates those actually on the land at the time of the vesting of the grant. This, of course, is incorrect. The grant must be construed as a whole. Turning to it we find that

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in section 2 it makes special provisions with respect to those who might be upon the land at the time of the grant. We read:

“And when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, preempted or otherwise disposed of, other lands designated, as aforesaid, shall be selected by said companies in lieu thereof under the direction of the Secretary of the Interior in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first named alternate sections.” (Ante, p. 36.)

This shows that it was not intended to include in the grants any lands upon which there were actual settlers, consequently the phrase “actual settlers” does not refer to those actually on the lands at the time the grants were made. This being so, the phrase must be treated in a prospective sense. It means persons selected by the grantees who shall purchase with the *bona fide* intention of actually settling upon the land.

The difficulty, if any exists, is with respect to the remedy which the Government would have in the event that the grantee failed to conform to the Congressional purpose.

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Does this provision constitute a covenant, a trust, an offer which any one may accept, or a condition subsequent?

Before entering upon a discussion of these questions we will try to ascertain what, if any, policy the Government had with respect to the disposition of the public domain at the time the amendatory act of 1869 was passed.

Second. THE GENERAL POLICY OF CONGRESS WITH RESPECT TO GRANTS OF THE PUBLIC DOMAIN CONSIDERED.

By what means are we to ascertain this policy?

(a) Congressional debates, other historical facts and acts *in pari materia* may be considered.

Whenever there is doubt touching the meaning of any document the circumstances leading up to its execution may be considered as aids in solving the doubts; they act as side-lights. So it is in case of legislation. Acts *in pari materia* and other historical facts bearing upon the legislation may be considered.

In *United States v. Union Pacific*, 91 U. S. 72, 79, the court said:

Courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary in order to ascertain the reason as well as the meaning of the particular provisions in it.

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In *Platt v. Union Pacific*, 99 U. S. 48, 64, following the rule in *United States v. Union Pacific*, *supra*, the court said:

In endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purposes from the language used in connection with the attending circumstances.

In *Smith v. Townsend*, 148 U. S. 490, 494, the court said:

It is well settled that where the language of a statute is in any manner ambiguous, or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times, and the defect or mischief which the statute was intended to remedy.

In *Mobile and Ohio R. R. Co. v. Tennessee*, 153 U. S. 486, 502), the court said:

Legislative contracts especially should be read in the light of the public policy entertained and the purposes sought to be accomplished at the time they were made rather than at a later period when different ideas and theories may prevail.

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It is equally true that the purposes of an enactment should not be confused with ideas and theories which may have prevailed at an earlier period; as, for instance, defendants in the case at bar seek to test the meaning of the act of April 10, 1869, by the purposes and policies which actuated Congress at the time of the enactment of the Pacific railroads bill on July 1, 1862.

(Preston v. Browder, 14 U. S. 115, 121; Wolcott v. Des Moines, 72 U. S. 681; Texas & Pacific v. Interstate Commerce Commission, 162 U. S. 197, 210; Hamilton v. Rathbone, 175 U. S. 414; Chesapeake, etc., Tel. Co. v. Manning, 186 U. S. 238, 245; Lewis' Sutherland Statutory Construction, Vol. 2, p. 883, *et seq.*, and cases cited.)

Under the category of historical facts and circumstances surrounding legislation fall debates in Congress. The views of one member, or even a number of members, should not have any influence in expounding the law. But if substantially all who spoke upon a pending measure agree with respect to the reason for its passage that would tend to show the purpose of the act, where the language used admitted of more than one meaning.

In *Jennison v. Kirk*, 98 U. S. 453, 459, the court referred to the remarks of a Senator, made in urging the passage of the bill, and said:

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These statements of the author of the act in advocating its adoption cannot, of course, control its construction where there is doubt as to its meaning; but they * * * serve to indicate the probable intention of Congress in the passage of the act.

In *American Net & Twine Co. v. Worthington*, 141 U. S. 468, 473, construing the tariff law, the court said:

While the statements made and the opinions advanced by the promoters of the act in the legislative body are inadmissible as bearing upon its construction, yet reference to the proceedings of such body may properly be made to inform the court of the exigencies of the fishing interests and the reasons for fixing the duty at this amount.

In *Holy Trinity Church v. United States*, 143 U. S. 457, 464, the court gave weight to the reports of the Congressional committees upon the legislation under review, saying:

We find, therefore, that the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the committee of each House, all concur in affirming that the intent of Congress was simply to stay the influx of this cheap, unskilled labor (p. 465).

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It will be remembered that the question before the court in that case was whether or not a contract made with a minister of the gospel came within the provisions of the act prohibiting contract labor, and it was held that in the light of the circumstances surrounding the legislation, much of which was found in the debates, it was not the intention of Congress to prohibit such contracts.

In *Binns v. United States*, 194 U. S. 486, 495, the court said:

While it is generally true that debates in Congress are not appropriate sources of information from which to discover the meaning of a statute passed by that body (*United States v. Freight Association*, 166 U. S. 290, 318), yet it is also true that we have examined the reports of the committees of either body with a view of determining the scope of statutes passed on the strength of such reports.

In *Blake v. National City Bank*, 90 U. S. 307, it was said:

Under these circumstances, we are compelled to ascertain the legislative intention by recurrence to the mode in which the embarrassing words were introduced, as shown by the journals and records.

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If it be said that this decision is in conflict with the decision in *Aldrich v. Williams*, 44 U. S. 24, in which it was decided that the construction placed upon the act by individual members of Congress in the debates which took place at the time of its passage would not be permitted to influence in any degree the judgment of the court with respect to its meaning, we say that a distinction must be marked between what individual members of Congress said and what was the general trend of the opinion expressed by members participating in the debate.

(The following cases support the foregoing: *United States v. Freight Association*, 166 U. S. 290, 318; *Downs v. Bidwell*, 182 U. S. 244, 254; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 40; *Collector v. Richards*, 90 U. S. 246, 258; *Dunlap v. United States*, 173 U. S. 65, 75; *Chesapeake & Potomac Tel. Co. v. Manning*, 186 U. S. 238, 245.)

(b) **Early public land acts.**

The Government at first looked upon its public lands as means of raising revenue and managed them with a view to that end. Consequently for many years it authorized sales of large tracts, without any reference to the number of acres which any one person might purchase, but solely for the purpose of getting the largest amount of money possible out of them. There was no general land law. Whenever the Government desired to dispose of lands

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within any particular area, it passed an act authorizing it to be done. The effect of this was to encourage speculation in, rather than actual settlement of, the public lands. A minimum price was fixed and the lands put up at public auction. Where the lands were not sold it was provided that they should not again be offered for sale, but should be subject to private sale at the minimum price fixed. There was nothing in these acts to encourage settlers to go upon the lands and establish homes. Notwithstanding this the lands were taken up by many, settlements were made, fields cultivated and homes established. Those who did this naturally sought means by which to secure to themselves the lands thus taken up. The matter was brought to Congress and it was compelled to take action for the protection of such settlers. In 1830 an act was passed wherein it was provided:

That every settler or occupant of the public lands prior to the passage of this act, who is now in possession and cultivating any part thereof in the year 1829, shall be, and he is hereby, authorized to enter * * * any number of acres, not more than 160, or a quarter section, to include his improvement, upon paying to the United States the then minimum price of said land. (4 Stat., 420, 421.)

On April 5, 1832, another statute was passed declaring that,

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All actual settlers, being housekeepers, upon the public lands, shall have the right of pre-emption to enter, within six months after the passage of this act, not exceeding the quantity of one-half quarter section. (4 Stat., 503.)

Experience soon developed the defects of the first public land system. The system obstructed and discouraged the settlement of the public domain. Congress soon began to correct this. But for forty years its efforts were of limited application, and afforded only partial relief. From 1801 to 1841 no less than thirty laws were passed extending the time of payment, waiving interest, and otherwise extending temporary relief to those who had settled upon the public domain. The system of survey was reformed, so as to permit the offering of the lands in smaller tracts, within the means of settlers. (Donaldson's Public Domain, 205.)

(c) Beginning of the pre-emption system.

Beginning with 1826 it became the practice to provide in all acts opening lands for sale that persons who had settled thereupon prior to a certain date named in the act should have a preference right to purchase the lands settled upon, to a limited quantity, usually 160 acres, at the minimum price established by Congress.

The public land question was the subject of frequent debates in Congress from 1830 to 1841. The

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celebrated debate between Webster and Hayne related to "Foot's resolution," touching the distribution of the public lands. During that debate Mr. Webster, on January 26, 1830, observed with respect to the public lands:

What I have said and what I do say is, that they are a common fund, to be disposed of for the common benefit, to be sold at low prices for the accommodation of settlers, keeping the object of settling the lands as much in view as that of receiving money from them. (Writings and Speeches of Daniel Webster, Vol. VI, p. 21, Ed. 1903, Little, Brown & Company, publishers.)

In 1839 he said:

As to donations to actual settlers, I have often expressed the opinion, and still entertain it, that it would have been a wise policy of government from the first to make a donation of a half or whole quarter section to every actual settler, the head of a family, upon condition of habitation and cultivation. (Writings and Speeches of Daniel Webster, Vol. VIII, p. 263, Ed. 1903, Little, Brown & Company, publishers.)

As a result of this discussion the Senate committee, of which Henry Clay was chairman, recommended for passage a measure which became known as the "Distribution bill." It became a law in 1841,

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and contained the first general pre-emption law. (5 Stat., 453.) It worked a reversal of the former public land policy. Under it actual settlers became a privileged class, and settlement of the public land was not only permitted, but invited.

In *Johnson v. Towsley*, 80 U. S. 72, 88, may be found an historical account of the influences leading to the adoption of this act. Sentiment in favor of the pre-emption law grew rapidly. In 1849 a new executive department was created for the administration of the public lands; it was called the "Home Department." This is significant. The pre-emption law became and remained a Congressional favorite. In 1853 and 1855 laws were enacted extending the right to unsurveyed lands in certain states, including the State of Oregon; and later this privilege was made general throughout the United States. The policy which treated the public domain as a source of revenue only was fading fast, and in its stead was coming the new and more enlightened policy which dedicated it to homes for the people.

In 1850 donation laws were passed by which settlers were given, free of cost, from 320 to 640 acres, in certain states, including Oregon (then a territory).

On August 4, 1854, an act was passed graduating the price for which "offered" lands which had been in the market and remained unsold for ten years or

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more. This was for the benefit of actual settlers only. (10 Stat., 574.)

In 1852 the platform of the Free Soil party declared:

That the public lands of the United States belong to the people, and should not be sold to individuals, nor granted to corporations, but should be held as a sacred trust for the benefit of the people, and should be granted in limited quantities, free of cost, to landless settlers. (History of the Presidency, Stanwood, Vol. 1, p. 255.)

In 1860 the public demand for a homestead law had become so general that all political parties favored it. Upon his election President Lincoln urged the immediate passage of such a law. It was passed, and by him approved May 20, 1862. It donated not exceeding 160 acres, free of cost, to those who would establish a home, reside upon and cultivate the same for a period of five years. (12 Stat., 392.)

In December, 1865, President Johnson in his annual message said:

The homestead policy was established only after long and earnest resistance. Experience proves its wisdom. The lands in the hands of industrious settlers, whose labor creates wealth

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and contributes to the public resources, are worth more to the United States than if they had been reserved as a solitude for future purchasers.''' (Richardson's Messages and Papers of the Presidents, Vol. VI, p. 362.)

The foregoing shows the trend of the public mind towards reserving the public lands for actual settlers.

(d) Grants to railroads and other internal improvements.

From 1802 to 1828 the right of Congress to make grants in aid of internal improvements was strenuously contested. The first grant was to Ohio in 1823 (3 Stat., 727), to aid in the construction of a wagon road in that state, and the last to the Texas Pacific Railroad, by act of March 3, 1871 (16 Stat., 473). The early grants were in aid of construction of canals, river improvements and wagon roads. It is not practical to review these grants in detail (we give a classified list of them in Appendix A).

A careful examination of the statutes just referred to will show that Congress never made grants in aid of canals, river improvements, wagon-roads or railroads, except on the theory that such improvements would result in the settlement of the lands tributary thereto. The construction of the improvements was not itself the object of any of these grants. It was but a means to an end, namely, the

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settlement of the public domain. A statute giving land to the Pacific Railroad in 1862, and all railroad grants, expressly excepted mineral lands. The policy of limiting railroad grants to agricultural lands indicates that it was contemplated by Congress, even if not expressed, that the lands should be sold to actual settlers.

After the Illinois Central Railroad grant, with one exception in Alabama, all grants have been for the odd numbered sections. One object of this was to enable the Government to share in the benefits resulting from the construction of the improvement, and by doubling the price of the intervening sections to avoid pecuniary loss. But it also served another purpose; it reduced the danger of land monopolies, as lands had in that form could best be disposed of in small quantities to settlers. It was natural for Congress to assume that lands in segregated tracts of 640 acres would not be attractive to speculators.

A few of the earlier grants directed the immediate withdrawal of lands which would "probably" fall within the terms of the grant. Until 1862 all grants were so framed. This practice led to a positive obstruction of settlement of the public domain, because from the date of the withdrawal until construction of the railroad the lands could not be acquired by settlers either from the Government or the

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railroad company. As soon as the injurious effect of the practice was discovered Congress promptly corrected it by inserting in all grants, commencing in 1862, provisions directing the withdrawal of the granted lands at the time of the filing of a map of general route and, in a few cases, of definite location and expressly providing that until this was done lands should be subject to pre-emption and homestead entry. The sole purpose of this, as interpreted by the Supreme Court of the United States, was to avoid any interruption of settlement upon the public lands. (*Railroad Company v. Baldwin*, 103 U. S. 426; *Winona, etc., v. Barney*, 113 U. S. 618, 625; *Leavenworth v. United States*, 92 U. S. 733, 748.)

(e) Provisions for forfeiture.

The first grants permitted the immediate sale of any or all of the lands granted, and provided that in case of failure to complete construction within the time prescribed the grantee (the state) should pay to the Government the purchase price received from the sale of the lands. Later, the grants provided for payment of the purchase price of the lands sold and forfeiture of the unsold lands. After 1852 the grants permitted sale of the lands only as the work of construction progressed, and provided that if default was made in the construction of the road within the time prescribed the unsold lands (afterwards the

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unpatented lands) should *revert* to the United States. This marked a complete reversal of the policy of what should happen in case of failure to comply with the conditions of the grant.* First the value of the lands was considered a sufficient remedy. Afterwards the lands themselves were required. They were of more importance to the Government than their value, because the Government desired them for actual settlers.

(f) Provisions as to sales and use of the granted lands.

Prior to March 3, 1869, none of the grants in aid of internal improvements contained any provisions restricting the sale of the lands, either as to character of purchaser, quantity, or price, except that prior to 1850 most of the grants provided that the lands should not be sold for less than double the minimum Government price, the only abuse of the grants then anticipated by Congress being the squandering of the lands at insignificant prices. But beginning about January 1, 1869, the uniform policy of Congress with reference to grants in aid of internal improvements, was to annex conditions to the grants restricting the sale of the lands to *actual settlers*, in quantities not greater than one quarter section to a single purchaser, and for a price not exceeding \$2.50 per acre. The manner in which this reformation was brought about we will now discuss.

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Prior to the enactment of the Pacific Railroad bill in 1862 all grants in aid of internal improvements were made direct to the *states* and not to corporations. Congress naturally assumed that the states, in disposing of the lands, would have due regard for permanent industrial and commercial conditions. It was not necessary in the judgment of Congress to enjoin upon a state a duty to sell the lands in a manner that would conserve the interest of the state as well as the nation. The states, in most instances, disposed of the lands by turning them over to some corporation charged with the duty of constructing the railroad or other internal improvement. The states assumed that it was even more to the interest of the railroad companies than to the states that the lands be distributed among the producing classes in small quantities. In this the states were mistaken, as the events prove.

Prior to the Pacific Railroad bill of 1862 there had been little practical experience in the administration of railroad grants. Evils which subsequently arose out of them had not been anticipated. Therefore nothing was put in that bill restricting the manner in which the lands should be sold. Besides the grant was to a corporation, created by Congress, with provisions for Federal representation upon the board of directors. It was argued, and reasonably so, that there was no likelihood of a conflict be-

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tween the interest of the corporation and those of the public. It was also thought that the interest of the railroad company was identical with that of the states, namely, that it would desire to promote settlement along its line. That Congress was mistaken in this no one will doubt who is at all familiar with the history of the construction of the Union Pacific.

Another thing worthy of consideration, in this connection; in 1866 the policy of the Union Pacific Railroad Company, with respect to the disposition of its lands, had not developed; so that it cannot be said that the act of July 25, 1866, was passed in the light of the manner in which the Union Pacific was administering its grant. Another fact worthy of consideration is that the two grants involved in the case at bar are the only original grants direct to state corporations that ever became effective.

Between March 2, 1867, and March 3, 1869, there was no legislation upon the subject of railroad land grants. The subject underwent, however, a thorough discussion and consideration in Congress during that period. This resulted, as we shall presently show, in the enactment of the restrictions in the amendatory act of 1869, involved in this suit.

(g) **Evils of unrestricted grants.**

The conclusion of the war of the rebellion was immediately followed by a revival of industrial progress that was without a parallel in the previous

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history of the country. No where was the effect of this revival felt more than in the Far West. The unlimited natural resources of the western country held forth promise to the actual settlers which attracted thousands from the crowded cities of the East and from foreign shores. Beginning early in 1867, the movement westward, and particularly along the Union Pacific Railroad, literally overtaxed the capacity of all means of transportation. It was then within the power of those responsible for the conduct of the affairs of the Pacific railroads to justly fulfill every moral and legal obligation to the people of the United States. But this condition of affairs also afforded an opportunity for manipulating the affairs of that railroad in the interest of a few promoters and officers, to the detriment of the corporation itself and the general public. The subsidy of bonds and lands, intended to promote the success of the enterprise, and at the same time conserve the general interests of the nation, were perverted into a means of enriching a few financial adventurers. The granted lands were disposed of in large blocks to speculators as well as to development companies organized by officers of the railroad company. The prices obtained for the lands were small, thus the railroad company lost and the settler was compelled to make terms with the speculator. These developments resulted in vigorous protests addressed to Congress complain-

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ing of the manner in which these lands were being manipulated. The protests were not limited to any one section, nor to any one class. They came from all parts of the country, and from the substantial and representative elements of the nation. Public sentiment upon the subject was expressed through the public press, legislative memorials and petitions signed by thousands of individual citizens, all directing the attention of Congress to the demoralizing effect of the methods practiced by the railroad companies. As an example of the earnestness with which they were urged upon the attention of Congress, we invite attention to a petition from citizens of New York City, signed by many thousands.

*To the Senate and House of Representatives of
the United States:*

The undersigned citizens of the United States feeling the urgent necessity for the enactment of a law to prevent the further absorption of the public lands of the United States by railroads and other corporations and to have the residue of said public domain set apart for the *exclusive use of actual settlers* in limited quantities, do respectfully petition your honorable body to take prompt action for the passage of such a law.

We urge our appeal on the grounds that tens of thousands of the industrial classes of large

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cities and towns now unemployed must seek an outlet and escape from the poverty and distress which surround them or be rapidly driven to pauperism and crime.

We urge our appeal on the ground of simple justice to our children and to the immigrants now seeking our shores, fleeing from the very monopoly of lands so alarmingly threatening our Republic by the enormous absorption of the public domain by giant corporations and private monopolies.

We urge our appeal as a measure of justice to the whole American people as a rich legacy in trust by our generation for those to come after us—never to be alienated.

We urge our appeal finally as one deeply affecting the morals and well-being of our people, in that these giant corporations have become the allies of stock gamblers in turning our public domain, the heritage of all, into one vast national gambling arena.

To put a speedy end to these threatened evils and to confer a measure of equity and justice on the American people, we urgently pray the adoption of a law embodying the features herein set forth.

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(h) Congressional action in response to these protests.

The prevailing sentiment was that Congress had been deceived, and was confronted with the duty not only to correct the mistakes of the past so far as possible, but to avoid similar ones in the future.

The history of the subject leaves no possible room for doubt as to the specific intent and purpose of Congress, which was:

First. To subordinate the benefits of land grants to the general land policies of the United States.

Second. To the end that the restrictions imposed should be enforceable by the most efficient and practical remedies.

Third. That the best method was through a condition subsequent.

A careful study of the discussions upon the subject fails to disclose that Congress reposed any confidence in the railroad grantees, or was disposed in any wise to trust to the good faith of the railroad companies. Lack of faith in the grantees because of what they had done, was the dominating note in the discussions. No crumb of comfort can be found therein for persons who insist that conditions, such as the one appearing in the amendatory act of 1869, was intended to be "unenforceable, directive and regulative."

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(i) Congressional debates and proceedings upon the subject.

The chairman of the Public Lands Committee in the House, George W. Julian, on January 7, 1868, introduced a bill to prohibit the further disposition of the public lands, except under the provisions of the pre-emption and homestead laws, and the laws for disposing of townsites and mineral lands. (Cong. Globe, 2 Sess., 40th Cong., p. 371.)

In February, 1868, Mr. Lawrence, of Ohio, introduced in the House a bill "to secure to actual settlers the right to purchase lands heretofore granted to railroad and other companies." (Cong. Globe, 2 Sess., 40th Cong., p. 637.)

The changing sentiment of Congress upon this subject was exemplified by the enactment, on March 6, 1868 (15 Stat., 39). By this enactment it was provided that the Government lands, intervening the Pacific Railroad lands, should be disposed of to actual settlers only, in limited quantities, and for a limited price.

In January, 1869, the Denver Pacific bill came up for consideration in the House. This bill did not provide for a new grant, but revived an old grant, upon slightly modified terms as to location of railroad, beneficiary, etc. The Denver Pacific grant was one of the grants incidental to the Union Pacific grant, and therefore the terms of the Union Pacific grant, and the evils that had developed therefrom became the principal subject of the discussion. Mr.

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Washburn, of Illinois, made the principal speech upon the subject. He said:

When you contemplate the vast power of these non-resident landholders, the overshadowing land monopoly created, the evils and oppressions always connected therewith, we must all be filled with amazement at the reckless and shameless legislation of Congress on this subject. * * * I voted for some of the earlier bills. But when I saw the use that was being made of these grants, the brazen greed of the speculators who obtained possession of them to use for their own interests regardless of the public interests; * * * my views in regard to the whole policy of land grants were very materially modified. (Cong. Globe, 3d Sess., 40th Cong., p. 463.)

The same views were expressed by Mr. Julian, Mr. Holman, Mr. Logan, Mr. Donnelly, Mr. Lawrence and many others. (Cong. Globe, 3 Sess., 40th Cong., p. 463, *et seq.*)

An examination of the debates will demonstrate that the quotation which we have given from Mr. Washburn's speech expresses the general sentiment upon the subject.

On January 19, 1869, when the Denver-Pacific bill first came up for discussion, Mr. Lawrence, Mr. Julian and Mr. Logan each proposed an amendment.

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All the amendments, while differing in some particulars, proceeded on the theory that the unrestricted right in the railroad companies to dispose of the lands as they saw fit had been abused and that a change must be made which would insure the lands to actual settlers, in limited quantities, and for a price not exceeding \$2.50 per acre.

Mr. Julian's amendment read:

That the lands granted * * * shall be sold to actual settlers only, in quantities not greater than 160 acres to one purchaser and for a price not exceeding \$2.50 per acre.

This amendment, he said, expresses the true policy; "and the whole land grant system of our country will be repudiated, unless it shall be made to conform to the conditions I have stated." (Cong. Globe, 3d Sess., 40th Cong., p. 70, Appendix). The amendment was adopted.

Thus three different methods of controlling the disposition of railroad lands were proposed on one day. All were framed in the belief that the unrestricted right in the railroad companies to dispose of the land as they saw fit had been abused and that a change must be made, which would insure the land to the actual settlers in limited quantities, and for a price not exceeding \$2.50 per acre.

It was in this atmosphere that the actual settlers' provision was placed in the amendatory act of April

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10, 1869, consequently, he who says that the provision was not intended to be mandatory, but merely directive, has a heavy burden to sustain.

(j) **Proceedings in Congress, 1869 to 1871, application of the new policy.**

(1) From March 2, 1869, to March 3, 1871, every time a bill granting lands in aid of internal improvements, or reviving a former grant that had lapsed, came before the House, Mr. Julian or some other member of the Public Lands Committee moved an amendment in the form of a condition subsequent, such as was finally insetred in the act of April 10, 1869, involved in this suit. This amendment was offered a great many times during that period, and it was accepted without opposition, except on two or three occasions, hereinafter referred to, when Congress thought best not to annex the condition; and the acts of Congress upon these occasions emphasizes the intention to make the conditions enforceable whenever they were annexed to grants.

The number of times that this amendment was offered and accepted must not be judged by the number of laws that were finally passed. The amendment was offered and became a part of many bills that were defeated. There were more than ninety measures of this kind that failed to pass during this period, and as to most of these the amendment was offered and accepted. During this period

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there were only three grants enacted; the West Side grant involved in the case at bar, the Texas Pacific grant subsequently forfeited, and the grant of March 3, 1869, to the State of Oregon to aid in the construction of a wagon-road from Roseburg to Coos Bay. (The act of April 10, 1869, is not a grant.)

The first bill granting lands to come before the House after the adoption of this new policy was the Coos Bay Wagon Road grant, just mentioned (15 Stat., 349). The history of this enactment discloses the fact that in some way the terms of the bill were juggled so as to omit the restriction as to actual settlers, although actually intended by Congress, or at least intended by the House.

The bill was known as Senate bill No. 167. It passed the Senate, and came before the House on March 2, 1869, the next to the last day of the Fortieth Congress. Immediately after the bill came up for consideration Mr. Julian offered his usual amendment. It reads:

Provided, That the grant of lands hereby made shall be *upon the condition* that the lands shall be sold *to actual settlers only*, in quantities not greater than one quarter section, and for a price not exceeding \$2.50 per acre.

Mr. Julian stated that the bill had not been considered in committee, but if the proposed amend-

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ment were accepted he would not insist upon a reference of the bill to the Public Lands Committee.

Mr. Mallory, Representative from Oregon, and who had charge of the bill, made a statement in favor of the bill. A motion to refer the bill to the Public Lands Committee was made and defeated. The bill came before the House on the question of Mr. Julian's amendment. Mr. Julian modified the amendment by adding the words "to each person" after the words "quarter section," making the clause read "in quantities not greater than one quarter section to each person." *The amendment was then agreed to without objection, and in that form the bill was passed, and the clerk of the House was ordered to report the action of the House to the Senate and request the concurrence of the Senate in the amendment.*

Being the next to the last day of the session, the matter was immediately communicated to the Senate without the usual precautions. It came up before the Senate within a short time on the same day. But in some manner the terms of the House amendment were changed in the meantime, and it was reported to, and read in, the Senate as follows:

"Provided further, That the grant of lands hereby made shall be upon the condition that the lands shall be sold to any one person only in

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quantities not greater than one quarter section and at a price not exceeding \$2.50 per acre.

The restriction as to actual settlers had been eliminated from the amendment. The change was not discovered, and in the latter form the amendment was concurred in by the Senate, and in that form the bill was enrolled, signed by the President of the Senate and Speaker of the House, and approved by the President of the United States the next day, March 3, 1869.

Whether this change occurred through inadvertence or through improper influences can only be conjectured. The haste with which legislative matters are handled on the last two days of a session made either possible. But there is no doubt of the accuracy of the foregoing facts.

(Congressional Globe, third session Fortieth Congress, p. 1798-1820.)

The proceedings show that the amendment proposed by Mr. Julian was not offered because of any special policy peculiar to that grant, but in fulfillment of the general policy as to all grants hereinbefore mentioned. This is borne out by the proceedings concerning another grant on the same day, and within a few minutes after the proceedings relating to the Coos Bay grant, when it was expressly stated that these amendments were offered pursuant to a general policy adopted by both Houses of Congress.

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Upon the same day, March 2, 1869, Senate bill No. 679 came before the House for consideration. The object of this bill was to extend the time for the construction of a wagon road under the act of July 2, 1864 (13 Stat., 355).

Pursuant to the policy that had been adopted, the moment this bill came before the House for consideration, Mr. Julian moved the following amendment:

Provided, That the grant of lands hereby renewed and continued shall be *upon the condition* that the lands shall be sold to actual settlers only, in quantities not greater than a quarter section and for prices not exceeding \$2.50 per acre.

In support of his amendment, Mr. Julian said:

Mr. Speaker, the amendment which has been read by the clerk is a *provision which ought to be applied to every future grant of land and to every dead grant that seeks a revival at our hands.* * * * The adoption of the amendment will not defeat the passage of the bill, for *the Senate like the House, has repeatedly approved of the very condition prescribed in the amendment.* (Cong. Globe, 3d Sess. 40th Cong., p. 1821.)

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Again we find *the intention to create a condition subsequent expressly declared*, and apparently understood and concurred in by all.

Congressman Mallory, of Oregon, was also in charge of this bill. He stated that he did not object to the principle of the amendment; but that the work of construction had been delayed not through the fault of the company, but through the interference of hostile Indians; and that an amendment at that late stage of the session would undoubtedly defeat the bill, because the Senate would not have time to concur. (The next day was the last of the session.)

Upon Mr. Mallory's statement as to the cause of the delay, the House permitted the bill to be put upon its final passage under the previous question, which did not permit any amendment.

Here we find an instance when, for legitimate reason, Congress omitted to impose the conditions. Under the contention of the defendants in the case at bar, Congress did not intend them to be enforceable in any case. Why then did Congress in some instances annex the conditions; in other instances modify them; and in still other instances decline to annex them? Is not the discrimination with which Congress annexed these conditions proof conclusive that it understood and intended them to be enforce-

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able, and hence the caution with which it imposed them?

A special session of the Forty-first Congress was convened shortly after March 4, 1869. During this session, three acts were passed, reviving lapsed railroad grants. They were all approved on April 10, 1869, and are as follows:

Act of April 10, 1869 (16 Stat., 47), extending the time for the Oregon Company to file assent to grant of July 25, 1866 (being the act involved in the case at bar).

Act of April 10, 1869 (16 Stat., 45), reviving grant to the State of Alabama in aid of the construction of railroads (being the act construed to be a condition subsequent by the Alabama Supreme Court in *Warrior River Coal & Land Co. v. Alabama State Land Co.* (154 Ala. 135, *infra*).

Act of April 10, 1869 (16 Stat., 46), extending time for the construction of railroad under grant to the States of Missouri and Arkansas.

By the time these bills came before Congress for consideration, the policy of annexing conditions restraining the sale of the granted lands had become so generally accepted that there was little discussion and no opposition. In each instance Mr. Julian moved his amendment in the form of a condition

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subsequent, and the amendments were agreed to as a matter of course.

The subsequent action of Congress with reference to the third act of April 10, 1869, above mentioned, is instructive. By the act of April 10, 1869 (16 Stat., 46), the time for the construction of the railroad under the grant to the States of Missouri and Arkansas (by act of Feb. 9, 1853) was extended. When the bill came before the House, Mr. Julian moved his usual amendment, assuming that the grant was in lapsed condition; and the amendment was adopted and the bill passed in that form. Subsequently it was learned that this assumption was incorrect; that there existed no default at the time of the passage of the act of April 10, 1869.

Thereupon, by act of March 8, 1870 (16 Stat., 76), Congress corrected the error that had been made by repealing the conditions imposed by the act of April 10, 1869. At the time the correction was made Mr. Julian expressly stated that the policy which had been adopted by both branches of Congress, to impose conditions of that character, when Congress had the right to do so, would not be departed from; but that through inadvertence the conditions had been imposed in a case where Congress had no right to do so, and he was therefore willing that the mistake be corrected. (Congressional Globe, second session Forty-first Congress, p. 1698.)

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The attitude of Congress toward railroad land grants on April 10, 1869, when the law involved in the case at bar was enacted, is aptly illustrated by the fact that on that day a joint resolution was adopted as follows:

That the Attorney-General of the United States be, and he is hereby, authorized and directed to investigate whether or not the charter and all the franchises of the Union Pacific Railroad Company and of the Central Pacific Railroad Company have not been forfeited, and to institute all necessary and proper legal proceedings. (16 Stat., 56.)

It is seriously urged by counsel for the defendants that Congress, by the enactment of April 10, 1869, involved in this suit, had the same general intent, and the same general sentiment upon the subject of railroad grants, that it had at the time of the enactment of the act of July 1, 1862. And yet, on the same day, Congress adopted a resolution which had for its purpose the forfeiture of every franchise created by the act of July 1, 1862.

That Congress should set no more traps for the American people of the pattern of July 1, 1862, was the predominating sentiment on April 10, 1869.

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(k) Discussions relating to act of May 4, 1870, West Side grant.

Early in 1870, Senator Williams of Oregon introduced in the Senate a bill making a separate grant to the West Side Company, for the purpose of ending the controversy in Oregon between the East Side and West Side companies over the grant under the act of July 25, 1866. So firmly intrenched had become the policy of refusing to make any new grants, or reviving any lapsed grants, except upon conditions restricting sales of the granted lands to actual settlers, in limited quantities and for a limited price, that a provision containing those restrictions was inserted in the bill introduced by Senator Williams. This bill was afterwards passed and became the act of May 4, 1870 (16 Stat., 94).

Counsel for defendants have referred to the debate in the Senate upon the subject of the act of May 4, 1870, in support of their contention as to the meaning and effect of the provision restricting sales to actual settlers. The Congressional Globe discloses the following:

The bill came up for discussion in the Senate on February 2, 1870. Senator Thurman vigorously objected to the bill, stating that the general assembly of Ohio had protested against any further land grants, and that the basis of this protest was the opposition to the unrestricted grant of July 1, 1862, known as the "Pacific Railroads bill." Senator Stewart then called Senator Thurman's attention to

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the provision restricting sales to actual settlers. Senator Thurman expressed a doubt that this provision would ever be obeyed or could ever be enforced by any practical method. Senator Stewart, Senator Cassary, and Senator Williams expressed the opinion that by virtue of the actual settler provision, settlers could go on the lands the same as under the public land laws. During this debate Senator Vickers said:

As I understand the bill *the company has no right to sell the lands to anybody but an actual settler. If the lands are sold to actual settlers there is no forfeiture. If a portion of the land is sold to actual settlers the portion unsold will be forfeited to the Government, if that condition is violated.*

(Observe that Senator Vickers understood that the right of forfeiture for breach of the condition would not affect lands that had been sold within the restrictions imposed, but simply to the unsold lands.)

Again, Senator Vickers said:

The grant is made *expressly upon condition that the lands are to be sold to actual settlers.*

It is not contended that the court should necessarily adopt the opinion of Senator Vickers. But it is at least interesting to observe that his interpre-

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tation of the meaning of the provision and the remedies available to the Government in case of a breach is strictly in accordance with the law upon the subject.

Upon the assurance that this provision would be effective, the Senate passed the bill.

(See Congressional Globe, second session, Forty-first Congress, pages 965, 1426-1430.)

When this bill came up for consideration in the House the same general debate took place. Reference was made to the fact that ten days previously a resolution was unanimously adopted declaring that land grants should cease; also to the fact that over ninety bills making grants of that kind had been introduced during the session and were then pending. Two Members of the House expressed the opinion that under the provisions of the bill the railroad company could be compelled to sell to actual settlers. Mr. Lawrence, of the Public Lands Committee, several times inquired if the bill contained a provision restricting sales of the granted lands to actual settlers, pursuant to the policy which had been adopted, and was assured that it did. Just before the bill was put upon its final passage, a member of the Public Lands Committee asked leave to add the amendment usually proposed by Mr. Julian. Those in charge of the bill stated that the provisions of sec-

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tion 4 were in substance the same as the proposed amendment. Upon this assurance, the bill was passed in that form.

(See Congressional Globe, second session Forty-first Congress, pages 2361, 3107-3110.)

(1) **Resolution of Congress of May 31, 1870.**

After the adoption of the policy to make no new grants, or to revive old grants that had lapsed, except upon condition that the granted lands should be sold to actual settlers only, there was but one real departure from that policy. That was by the resolution of May 31, 1870 (16 Stat., 378), relating to the Northern Pacific grant. This resolution, among other things, authorized the Northern Pacific Company to construct a line connecting Portland with Tacoma, and extended a grant of land in aid of the construction thereof, upon the same terms as the original grant. Pursuant to the policy hereinbefore spoken of, an amendment was offered, in the form of a condition subsequent, restricting the sale of the granted lands to actual settlers, in quantities not exceeding 160 acres, and for a price not exceeding \$2.50 per acre. This precipitated one of the most protracted debates in Congress down to that time.

The fight was a bitter one, finally resulting in the substitution of an amendment providing that the lands not sold or otherwise disposed of at the expiration of five years after the completion of the

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railroad, should be subject to preemption; being identical in terms with the provision of the Union Pacific grant construed in the case of *Platt v. Union Pacific* (99 U. S., 48). It is unnecessary to comment upon the methods by which this result was brought about. It is sufficient to say that no legislation of Congress ever created a greater scandal. Charges of corruption were freely indulged during the debate. Mr. Julian, and a few of the other members of Congress, who had been foremost in the fight for the extension of the principles of the actual settler policy to railroad grants, were absent. The bill passed both Houses by a very narrow margin.

The action of Congress upon this occasion in no way detracts from its general intent with reference to the annexing of conditions restraining the method of selling granted lands. On the contrary, the character of the debate, and the action of Congress show that the sentiment of Congress was divided into two general classes; some contending for the imposing of effective restrictions upon the manner of selling the granted lands, the others being opposed to it. Those who favored the imposing of effective restrictions, proposed to do so by an amendment exactly the same as the provision of the act of April 10, 1869. Those opposed to it proposed as a substitute a provision identical with that involved in the *Platt Case*. It was understood by everyone that the one provision had a meaning and effect directly

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the reverse of the other; and each was supported by its friends upon that ground. If the contention of the defendants in the case at bar is correct, and these provisions are identical in general purpose, then every Member of Congress was mistaken and a long and bitter fight was carried on with nothing at issue.

In the face of this controversy in Congress (which was virtually contemporaneous with both the act of April 10, 1869, and the act of May 4, 1870) it is the height of absurdity to contend that by the provision of the act of April 10, 1869, Congress meant the same as by the provision in the Union Pacific grant, or the similar provision in the resolution of May 31, 1870.

The passage of the resolution of May 31, 1870, relating to the Northern Pacific grant, with no restrictions upon the sale of the granted lands, was the death knell of the system of granting lands in aid of internal improvements. It was but a momentary lapse of the new policy; it involved but a small quantity of lands; and the practical effect of it was to hasten the abolishing of grants in aid of internal improvements, upon any terms or conditions.

The sentiment against land grants developed so rapidly, that President Grant, in his second annual message, on December 5, 1870, recommended that no further grants be made in aid of internal improve-

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ments; but that if Congress disagreed with him, in all future grants the rights of settlers and the interests of the Government should be better protected, by appropriate legislation.

The recommendation of the President reflected the prevailing sentiment of Congress. The system of land grants was abolished. There was but one exception, the Texas-Pacific grant of March 3, 1871, the circumstances of which will now be explained.

(m) **Texas-Pacific grant of March 3, 1871.**

From 1862 to 1866 Congress had made three large grants establishing transcontinental lines for the benefit of the Northern States—the Union Pacific, the Northern Pacific, and the Atlantic and Pacific—with several branch lines. The Southern States received virtually no benefits from these grants. *This led to the passage of the Texas-Pacific bill.* (16 Stat., 573.)

Shortly after peace was established, the conservative members of Congress advocated the adoption of reasonable concessions to the South, to heal the wounds caused by the unfortunate conflict. Among the proposed measures of this kind was a grant of public lands to aid in the construction of a transcontinental railroad for the benefit of the Southern States, extending from New Orleans to the Pacific coast.

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When the bill came up for consideration, Mr. Julian moved his usual amendment, pursuant to the policy then prevailing. But in answer to the proposed amendment, it was stated that by way of conciliation of the South, it was desired to make the Texas-Pacific bill identical in terms with the Union Pacific grant. At the same time the general policy of making no further grants was emphasized. There is no mistaking the purpose of Congress. It was expressly declared that the hope of promoting friendly relations between the North and the South, justified a temporary departure from the prevailing policies of Congress.

The action of Congress on the same day, March 3, 1871, with reference to a bill reviving another of the grants to the State of Alabama, emphasizes the policy of Congress. Mr. Julian again offered his amendment. There being no reason to depart from the established policy in this instance, the amendment was accepted without opposition and as a matter of course. (See act of Mar. 3, 1871, 16 Stat., 580.) *This discrimination on the part of Congress can be explained only on the theory that Congress understood and intended that these restrictions when imposed should be binding and enforceable, and to that extent subordinate the benefits of the grants to the general public land policies of the United States.*

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(n) Policy of Congress since March 3, 1871.

After March 3, 1871, there was no change of policy. The sentiment against land grants gradually increased until it became an established national principle. This opposition to land grants was soon expressed in a number of acts to forfeit the grants in cases where the grantees were in default; and in the enactment of the general forfeiture act of September 29, 1890. (26 Stat., 496. For list of acts see Appendix B.)

All these acts were sustained by the Supreme Court. (*United States v. O. & C. R. R. Co.*, 164 U. S. 526; *Atlantic & Pacific v. Mingus*, 165 U. S. 413; *United States v. Tennessee & Coosa R. R.*, 176 U. S. 242.)

For the past twenty-five years the policy of the Government has been to hold the railroad companies strictly within the limitations of their grants, and prevent the invasion of any rights reserved on behalf of the public. It was pursuant to this general policy, and as a logical sequence of the previous history of the subject, that when Congress became advised of the willful and flagrant violation of the restrictions imposed by the acts of April 10, 1869, and May 4, 1870, involved in the case at bar, by resolution of April 30, 1908, it directed and authorized the institution of this suit to enforce the rights of the people of the United States, including the right of

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forfeiture for breach of these conditions.

It is respectfully submitted that an intelligent and impartial consideration of the history of the subject leads to the following conclusion:

By the act of April 10, 1869, and the act of May 4, 1870, Congress intended to annex to the grants involved in the case at bar conditions subsequent restraining the alienation of the granted lands by the railroad company within the three limitations prescribed.

Did Congress use apt words to express its intention? This brings us back to the question, "Does the actual settlers provision constitute a covenant, a trust, an offer which anyone may accept, or a condition subsequent?"

Third. NOT A COVENANT.

Transactions relating to the disposition of the public domain do not resemble those of a private owner engaged in selling lands with the sole motive of realizing their pecuniary value.

In *United States v. Trinidad Coal Company*, 137 U. S. 160, 170, the court observed that in disposing of public lands the Government does not occupy the "attitude of a mere seller of real estate for its market value."

The mere construction of the railroad was not the ultimate object, but the means of accomplishing

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the object which Congress had in mind. The railroad was looked upon as a means to promote settlement. (*Platt v. Union Pacific Railroad Co.*, 99 U. S. 48.) Congress never intended that the grant to it would obstruct or prevent settlement.

The amendatory act of April 10, 1869, was designed to correct some defect in the original act and must be construed in that light.

From the nature of the enactment and its manifest purpose it necessarily follows that Congress intended that it should be enforceable by some practicable and thorough method. To say that it did not change the legal effect of the act of 1866, would be to say that Congress in making the amendment had done a useless thing. No rule of construction will permit this if it can possibly be avoided.

It must be presumed too that Congress intended to adopt the method best calculated to carry out its purpose.

In *Gibson v. Chouteau*, 13 Wall. 92, the court, speaking of the public domain, said:

Congress has the absolute right to prescribe the terms, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfers shall be made.

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Would it serve the congressional purpose to construe the actual settlers provisions as a covenant? For breach of a covenant the action is for pecuniary damages. In *Tiffany on Real Property*, Vol. 1, p. 160, it is said:

A condition is to be distinguished from a covenant, a breach of which merely renders the covenantor liable in damages.

Suppose the government had brought a suit to recover damages for a breach of the alleged covenant; what would have been the measure of its recovery? The government, as such, would gain not a penny by the observance of the provisions; consequently could not be damaged by its non-observance.

Ordinarily covenants affect only the parties and do not affect the land. Conveyances in violation of a covenant are valid. Covenants in restraint of the power of alienation are absolutely worthless.

In *Warvelle on Vendors*, 2 ed. Vol. 1, sec. 451, it is stated "that a restraint upon the power of alienation is nugatory unless made enforceable by provision for reverter."

In *Hale v. Finch*, 104 U. S. 261, the distinction between a covenant and a condition is discussed and the rule laid down that where the instrument, whether a bill of sale, deed or grant, precludes the idea of personal responsibility, it is not a covenant. There

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is nothing in the clause under consideration which implies such responsibility.

The actual settlers provision was not incorporated for the purpose of securing to the United States pecuniary damage, but for the purpose of realizing the fruits of a national policy; therefore, it is not a covenant.

Fourth. NOT A TRUST AS CONTENDED BY CROSS-COMPLAINTS.

Cross-complainants contend that the settlers clause creates a trust in favor of actual settlers and that they are entitled to avail themselves of it.

(a) The actual settlers clause contemplates a sale.

There is nothing in the actual settlers provision indicating that Congress had confidence in the railroad company. The reverse is true. Experience had demonstrated that railroad companies, in matters of this kind, should be restrained, not trusted. If this be a trust Congress deliberately committed to a party, having a known adverse interest, the discharge of an important governmental function with reference to several million acres of land. If the trustee proved recreant it could lose nothing; but it might gain much. The government would have no remedy. The fact that Congress imposed restraints argues that it believed them necessary. This rebuts the idea of confidence.

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Clearly the railroad company was empowered to sell the land. A sale is a contract and implies discretion upon the part of the vendor and vendee. The vendor in this case had all the rights of any vendor, except that (1) it must not sell more than 160 acres to any one person; (2) the sale must be to an actual settler; and, (3) for a price not to exceed \$2.50 per acre. Within these limitations the railroad company had the same discretion as any other vendor would have in making a sale. It might choose the actual settler; might sell for any price not exceeding \$2.50 an acre; might sell in quantities of 40, 60 or 100 acres; or in any amount not exceeding 160 acres.

Besides, instruments creating trusts do not use the language of bargain and sale. Every word in the provision repels the idea of a trust.

(b) **Restrictions imposed do not rest upon confidence.**

A trust implies a confidence by the creator thereof in the trustee. In 28 A. & E. Enc. of Law, 858, it is said a trust may be defined as

An obligation arising out of a confidence reposed in one who has the legal title to property conveyed to him, that he will faithfully apply and deal with such property according to the confidence reposed.

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We do not understand that cross-complaints claim as beneficiaries of a charitable trust. The actual settlers provision contains nothing that could bring it within the recognized definitions of such a trust. If, therefore, there be a trust it must be a private one and subject to all the tests applicable to such a trust.

(c) **Necessary elements of an enforceable trust.**

In Second Pomeroy's Equity Jurisprudence, Section 1009, we find this language:

The declaration of trust, whether written or oral, must be reasonably certain in its material terms; and this requisite of certainty includes the subject matter or property embraced within the trust, the *beneficiaries* or persons in whose behalf it is created, the nature and quantity of interest which they are to have, and the manner in which the trust is to be performed. If the language is so vague, general or equivocal, that any of these necessary elements of the trust is left in real uncertainty, then the trust must fail. (Italics ours).

There is a distinction between charitable trusts and those that are not. This distinction must be kept in mind.

In most jurisdictions the uncertainty of the beneficiaries is a characteristic of a charitable trust.

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In Beach on Trusts and Trustees, Sec. 322, it is said:

In a charitable trust, the beneficiaries need not be definitely named, and even where there is no adequate designation of a *cestui que trust* the trust will be enforced in equity if the intention of the settlor can be ascertained beyond a reasonable doubt. (Russell v. Allen, 107 U. S. 163; Perry on Trusts, secs. 66 and 95.)

Where the trust is *not* a charitable one, and in some jurisdictions where it is, the beneficiaries must be definitely pointed out.

In Levy v. Levy, 33 N. Y. 97, 107, the court said:

If there be a single postulate of the common law established by an unbroken line of decision, it is that a trust without a certain beneficiary who can claim its enforcement is void, whether good or bad, wise or unwise.

In Weaver v. Spurr, 56 West Va., 95, 105, it is said:

There cannot be a trust without a *cestui que trust*; and if it cannot be ascertained who the *cestui que trust* is, it is the same thing as if there was none.

In Brown v. Caldwell, 23 West Va. 187, we read:

It is difficult to conceive of anything more vague, indefinite, and general in its character.

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The societies here designated are neither local nor fixed. They, in fact, embrace the whole Christian world, and are not only indefinite but unascertainable.

This was a charitable trust, but subject to the same rules as those which apply to private trusts.

In *Heiss, Executor, etc., v. Murphey et al.*, 40 Wis. 276, 292, the beneficiaries were Roman Catholic orphans. The bishop was named as trustee and authorized to sell the property and “use the proceeds for the benefit of the Roman Catholic orphans.” The court held that the trust was too indefinite as to the beneficiaries for enforcement and observed:

There are no ascertainable beneficiaries, either as a class or individuals, and therefore the trust cannot be effectually carried out.

In *Wheeler v. Smith*, 9 How. 55, the trust provision was declared invalid, because, to use the language of the court:

A trust is vested in the executors, but the beneficiaries of the trust are uncertain and the mode of applying the bounty is indefinite. (*Perin et al. v. Carey et al.*, 65 U. S. 465; *Jones v. Habersham*, 107 U. S. 174; *Vidal v. Girard's Executors*, 2 How. 127.)

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The effect of all these decisions is that, while in some jurisdictions the same definiteness as to beneficiaries is required in charitable trusts as in private trusts, in all jurisdictions private trusts must be so definite as to the beneficiaries that the terms used therein to describe them will enable any one to select them without doubt.

(d) **Beneficiaries Indefinite.**

Could there be anything more indefinite than the description of the alleged beneficiaries in the actual settlers provisions. If it be said that “actual settlers” constitute a class, and that the description thereof is definite, we answer that the grant is not to a class as a whole, to be enjoyed by the members thereof as tenants in common. It contemplates a division of the land amongst many people. Moreover to be actual settlers they must belong to one of two classes (a) those who have actually settled upon the lands, or (b) those who have not but are actual settlers elsewhere. If to the latter class it is a very numerous one, for actual settlers may be found in the city, the state or nation. Most of the population of the United States consists of actual settlers. So large is this class that there would not be an acre apiece in all the grants for a third of the number composing it. A selection would, therefore, have to be made of those who might be accommodated. That selection has not been made. Until it has been

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the actual settlers—the alleged beneficiaries—cannot be known. They are, therefore, indefinite—nothing could be more so—and, consequently, the trust, if one was intended, is void for uncertainty with respect to the beneficiaries.

If they belong to the first class they are trespassers, because they could not become actual settlers, lawfully, without the consent of the owner, and that has not been given. Indeed to say that it was within the intention of Congress that persons might acquire a right to the lands by becoming trespassers thereon, would be to say that Congress had given them a right conditioned on their doing wrong, which would be absurd.

(c) **Another objection to cross-complainants theory.**

Trusts are either executory or executed. In *Beach on Trusts and Trustees*, section 59, the distinction is pointed out. He says:

Has the testator been what is called, and very properly called, his own conveyancer? Has he left it to the court to make out from general expressions what his intention is, or has he so defined that intention that you have nothing to do but to take the limitations he has given to you and convert them into the legal estate? (*Nicoll v. Ogden et al.*, 29 Ill. 323, 385; *Neves v. Scott*, 9 How. 196, 211.)

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If this be a trust, is it executed or executory? It is the former if there be nothing left to the discretion of the railroad company; if the company must sell a certain quantity at a certain price, and upon certain terms to the *cestui que trust*. But this is not required. The only limitations placed upon the company are maximum limitations; within those it may exercise its own volition. It may sell in quantities of forty, sixty or one hundred acres, at fifty cents, a dollar, or two dollars and fifty cents an acre; for cash, or upon such terms, and with such security, as it may choose. The trust then, if one at all, is an executory trust. Until the choice of the trustee has been made in the matters left to its choice, the cross-complainants could acquire no rights in any of the property. So that even if we say the beneficiaries are definite, they could have no enforceable rights until the trustee had fixed the terms upon which they might secure them.

(f) Decisions against cross-complainants.

In *Nichols v. Southern Oregon*, 135 Fed. 232, a provision in the grant of March 3, 1869, quite similar in its terms to the settlers clause in the case at bar, was construed by the court. The provision reads:

Provided further, That the grant of land hereby made shall be upon the condition that the lands shall be sold to any one person only

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in quantities not greater than one quarter section, and at a price not exceeding \$2.50 per acre.

The plaintiff in that case selected 160 acres, tendered to the defendant \$2.50 per acre therefor and demanded a conveyance. The defendant refused. Plaintiff brought suit upon the theory that he had a right to a conveyance. The court denied his claim for the following reasons:

The grant was not a law for the sale of the granted lands. It did not offer them for sale. That was left to the State, subject to restrictions as to the price at which they would be sold and the quantity that should be sold to any one person. These restrictions were mere incidents of the grant, mere regulations that the State was required to observe in selling the granted lands, at such time after they were earned as the State should conclude to sell them. The object to be accomplished in no-wise depended upon them. Whatever rights existed in respect to these restrictions belonged to the United States. No interest was created in the complainant. He is not a beneficiary in the grant, and he has no standing to complain that the State has violated its conditions in the manner in which it has disposed of the granted lands. That is a matter that can only be taken

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advantage of by the United States. Furthermore, above 30 years ago Congress authorized patents to issue to the State or to any corporation or corporations to which it had transferred its interest, and patents have been issued to the State's grantees in pursuance of that law. It is not necessary to consider whether this act was a waiver by Congress of the conditions subsequent in the grant.

In *Warrior River Coal & Land Company v. Alabama State Land Company*, 154 Ala. 135, the Supreme Court of Alabama was called upon to construe the provisions of the act of April 10, 1869, renewing the railroad grant to the State of Alabama under the act of June 3, 1856. This act contained a provision identical with the settlers clause in our grant. Speaking of it the court said:

The limitation quoted from the act was, at most, a condition subsequent, a violation of which rendered the estate in the particular instance amenable to forfeiture by the appropriate action of the granting government, and by that only.

According to the view of this court the right to take advantage of the violation of the grant was in the Government and in nobody else. *Ergo* not in actual settlers.

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Cross-complainants cited the following decisions, in the court below, in support of their contention: Rice v. Railroad Company, 1 Black 358; Mills County v. Railroad Company, 107 U. S. 557; United States v. DesMoines, etc., Co., 142 U. S. 527; Ashuelot Nat. Bank v. City of Keene, 9 L. R. A. (N. S.) 758. They can all be distinguished.

The Rice case was with reference to a grant to the Territory of Minnesota for certain purposes. There was no beneficiary.

The Mills case was a case in which certain lands were granted to the State of Iowa for stated purposes. It was claimed that the State had not observed the requirements of the act. The court decided that the question was one between the United States and the State; that the obligation imposed did not constitute a trust which private parties could enforce.

The Des Moines, etc., case construed a grant to the Territory of Iowa to aid in the improvement of the Des Moines River. The court decided that no *cestui que trust* was created and that the grant was to the Territory to be used for a specific purpose.

The Ashuelot Nat. Bank case disposed of a controversy with respect to the provision of a deed. The heirs of the grantor sought to have the provision declared a condition subsequent. The court

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refused to do this, but held that the deed created a trust in favor of the city for a certain purpose. The trust was in the nature of a charitable one.

None of the foregoing authorities give any countenance to the contention of the cross-complainants.

If cross-complainants assert that the trust is a charitable one they must also fail, because the idea of such a trust is utterly inconsistent with the idea of an exclusive interest in any of the beneficiaries. In a charitable trust the persons to be benefitted must be vague, uncertain and indefinite until they are selected or appointed to be the particular beneficiaries of the trust for the time being (Perry on Trusts and Trustees, 6 ed. sec. 710). They cannot select themselves. As possible beneficiaries of a charitable trust they would have absolutely no standing in court to enforce the trust (*Boenbardt v. Loch*, 113 N. Y. S., 747; *Burbank v. Burbank*, 152 Mass., 254).

Fifth. NOT AN OFFER WHICH ANYONE MAY ACCEPT, AS INTERVENORS CLAIM.

(a) Have the intervenors acquired vested rights against the Government.

The intervenors claim that the grant makes a standing offer to any one who may qualify himself to accept it. They say that they have qualified themselves by declaring their intention to become

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actual settlers and tendering the price fixed in the grant. This, they assert, amounts to an acceptance of the offer, and gives them a vested right which they can enforce against both the railroad company and the Government. They say that their position is analagous to that of preemptors and homesteaders. And this leads to the inquiry, when does the preemptor or homesteader acquire a vested right against the Government? Not until he has performed all that is required of him by the law to entitle him to a patent; up to that time he has no vested right.

In *Frishie v. Whitney*, 9 Wall. 187, the court quoted with approval, the following:

A mere entry upon land, with continued occupancy and improvements thereof, gives no vested interest in it. It may, however, give, under our national land system, a privilege of preemption. But this is only a privilege conferred on the settler to purchase land in preference to others. * * * His settlement protects him from intrusion or purchase by others, but confers no right against the Government. (10 Opinions of the Attorney-General, 57.)

In *Yosemite Valley case*, 15 Wall. 77, we find this:

When these prerequisites (including the payment of the purchase price) have been complied

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with, the settler for the first time acquires a vested interest in the premises occupied by him, of which he can not be subsequently deprived.

* * * The United States by those acts enter into no contract with the settler, and incur no obligation to any one that the land occupied by him shall ever be put up for sale. They simply declare that in case any of their lands are thrown open for sale the privilege to purchase them in limited quantities, at fixed prices, shall be first given to parties who have settled upon and improved them. The legislation thus adopted for the benefit of settlers was not intended to deprive Congress of the power to make any other disposition of the lands before they are offered for sale, or to appropriate them to any public use.

(*Shepley v. Cowan*, 91 U. S. 330; *Atherton v. Fowler*, 96 U. S. 513; *Wirth v. Branson*, 98 U. S. 118.)

Under these authorities intervenors have no interest which they can enforce against the Government.

(b) Have they acquired vested rights against the railroad company.

The authorities make it clear when the rights of preemption and homestead attach.

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In *Hastings, etc., Railroad Co. v. Whitney*, 132 U. S. 357, the court said:

Under the homestead law three things are needed to be done in order to constitute an entry on public lands: First, the applicant must make and affidavit setting forth the facts which entitle him to make such an entry; second, he must make a formal application; and, third, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is executed and delivered to him, the entry is made—the land is entered.

In *Northern Pacific Railroad v. Colburn*, 164 U. S. 383, 386, the court says:

But frequent decisions of this court have been to the effect that no preemption or homestead claim attaches to a tract until an entry in the local land office.

The court, quoting from *Lansdale v. Daniels*, 100 U. S. 113, 116, adds:

Such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a preemptor, the rule being that his settlement alone is not sufficient for that purpose.

In *Tarpey v. Madsen*, 178 U. S. 215, 225, it was said:

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And the acceptance of such declaratory statement, and noting the same on the books of the local land office, is the official recognition of the preemption claim.

(*Eastern Oregon Land Co. v. Brosnan*, 147 Fed. 807; *Maddox v. Burnham*, 156 U. S. 544.)

These decisions hold that homesteaders and pre-emptors acquire no rights until an entry has been made by the one and a proper notation in the land office of a preemption by the other.

The intervenors have done nothing which is the equivalent of those requirements.

It is a rule that where there is a contest between rival claimants the one first in occupancy of the land with intention of appropriating it is given priority, but this rule does not aid the intervenors.

In *Atherton v. Fowler*, *supra*, the court, after saying that the law intended to give the settler time to build a house, break up the ground, and make settlement first and payment afterwards, continued:

During this preliminary period he had no vested right to the land; but, as we have elsewhere decided, he did thus acquire the right of preference in the purchase—that is to say, if he made the necessary settlement and improvement, and the necessary declaration in writing,

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no other person could buy the land until the period elapsed which the law gave him to pay the purchase money.

In *Tarpey v. Madsen*, *supra*, this was said:

So that any controversy between two occupants of a tract open to preemption and homestead entry is not determined by the mere time of the filing of the respective claims in the land office, but by the fact of prior occupancy.

So far then, as his rival is concerned, the claimant first in possession has what is equivalent to a vested right, but he has no such right as against the Government.

(c) **Decision relied on by intervenors.**

In *Jumbo Cattle Co. v. Bacon*, 17 S. W. 136, a grant made by the State of Texas was construed. It provided for the sale of the land at fifty cents per acre to any responsible person who would make application therefor and survey it. The plaintiff showed that he had done all these things, except paying the price, which he tendered. There was a definite offer there, on definite terms. Plaintiff accepted the offer and complied with the terms so far as he could. The court said:

When there is an offer made by the act of the legislature, which is accepted by an individual, there is a contract which it is not within

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the power of the State to impair. * * * The expenses of the surveys, in connection with the price to be paid to perfect the title, are sufficient consideration to support the contract.

A casual inspection of the two acts will show there is no similarity between their respective terms. In the Texas grant there was a specific offer to sell such quantity as the applicant might select at fifty cents per acre. The plaintiff accepted the offer in the precise terms in which it was made, and thereby a contract came into existence between him and the State of Texas.

Now, look again at the terms of the actual settlers provisions. If it be treated as an offer to sell, how much land was offered to each settler? What was the price? How was it to be paid for, in cash or on time? The grantee might have one view about these matters, the settlers another. Until they agreed there was no meeting of the minds and, hence, no contract.

Another matter in this connection: Congress has provided an orderly method for the distribution of the public lands; it has provided with exactness the terms upon which they may be acquired by those desiring them. When the Government withdrew the lands covered by this grant it authorized the railroad company to dispose of them as it might think proper within certain limits. If the views pressed

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upon the court by the intervenors prevail Congress abandoned its orderly policy of years, and substituted therefor one of irregularity and uncertainty.

(d) Not a contract for benefit of third parties.

Are the intervenors entitled to invoke the principle that where a contract is made with one party for the benefit of a third, the latter may avail himself of it and enforce it by suit if necessary? No, because in such cases the persons for whose benefit the contract is made are defined. Here there is no such definition. Who can say that he has a right to any particular part of the land? Concededly, he has no right to more than 160 acres, but by what rule of construction can it be said that he has a right to that number of acres, rather than fifty or forty. We have fully discussed the uncertainty of the alleged beneficiaries (*Ante*. p. 189).

Neither the cross-complainants nor the intervenors have any rights in the premises.

THE ACTUAL SETTLERS PROVISION OF THE AMENDATORY ACT OF 1869 CONSTITUTES A CONDITION SUBSEQUENT.

First. General characteristics of conditional estates.

Where an estate is granted and its continuance made to depend upon the doing of something by the grantee, it is an estate upon condition subsequent. No particular form of words is necessary to create

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such an estate; if the intention appears from the language used it will be enforced. But there are certain words which, if used, necessarily evidence the existence of such an estate. They may be divided into two classes (a) where the grant is followed by the words “provided that, so as, or under this condition”; in such cases words of re-entry are not necessary; and (b) where the grant is followed by words “*si contingat*” and the like, but these latter words must be followed by words authorizing the grantor to re-enter.

In Sheppards Touchstone (p. 121) we read:

Conditions annexed to estates are sometimes so placed and confounded amongst covenants, sometimes so ambiguously drawn, and at all times have in their drawing so much affinity with limitations, that it is hard to discern and distinguish them. Know, therefore, that for the most part conditions have conditional words in their frontispiece, and do begin therewith; and that amongst these words there are three words that are most proper, which *in and of their own nature and efficacy, without any addition of other words of re-entry in the conclusion of the condition*, do make the estate conditional, as *proviso, ita quod*, and *sub conditione*. And therefore if A grants lands to B to have and to hold to him and his heirs, *provided that*, or so

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as, or under this condition, that B do pay to A ten pounds at Easter next; this is a good condition, and the estate is conditional without any more words. But there are other words, as *si; si contingat*, and the like, that will make an estate conditional also, but then they must have other words joined with them, and added to them in the close of the condition, as that then the grantor shall re-enter, or that then the estate shall be void, or the like.

The same authority states the rule in another way (p. 122):

Where the word “provided” is inserted amongst the covenants of the deed, it doth make the estate conditional when there are these things in the case:

1. When the clause wherein it is hath no dependence upon any other sentence in the deed, nor doth participate with it, but stands originally by and of itself.

2. When it is compulsory to the feoffee, donee, etc.

3. When it comes on the part, and by the words of the feoffor, donor, lessor, etc.

4. When it is applied to the estate, and not to some other matter.

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The second and third qualifications are clear and need no word of explanation. Touching the first it is said:

But if the clause have dependence on another clause of the deed, or be the words of the feoffee, etc., to compel the feoffor to do something, then it is not a condition but a covenant only; as if there be in the deed a covenant that the lessee shall scour the ditches, and then these words follow “provided that the lessor shall carry away the earth.”

As to the fourth qualification it is said:

So if this clause be applied to some other thing, and not to the thing granted, then it is no condition, as if a lease of land be made rendering rent at B. Provided that if such a thing happen, it shall be paid at C.; this doth not make the estate conditional.

The proviso in the act of 1869 “stands originally by and of itself” and has “no dependence upon any other sentence”; “it is compulsory to the” grantee; “it comes on the part and by the words of the” grantor; “it is applied to the estate and not to some other matter.” Therefore, it answers every test of the rules laid down by Touchstone. A careful examination of these rules show that they find uniform support in all the early English decisions and may be treated as accurate expressions of the an-

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cient common law upon the subject. (Littleton's Tenures, Secs. 328-331; Coke upon Littleton, Secs. 328-331, 203 a. b., 204 a.; Cruise's Dig., vol 4, 352, 353, Tit. 32, ch. 25, Secs. 1-6; 3 Comyn's Dig. 74, 76, Condition A 2, A 4; Bacon's Abr. Vol. 2, Title, Condition A.; Sheppard's Touchstone, 121, 122).

The modern decisions are in harmony with the ancient authorities.

In Tiedeman on Real Property, 3 Ed., Sec. 201, we read:

No particular words or forms of expression are really necessary for the creation of such an estate. Any words, particularly in wills, which show the intention to annex a condition to the estate granted will be sufficient. Such phrases, however, as "on condition," "provided," "if it shall so happen," etc., are found in constant use, and, if resorted to, will ordinarily remove any doubt as to the grant being an estate upon condition.

In Warvelle on Vendors, 2 ed., Vol. 1, Sec. 445, it is said:

The use of technical words which in themselves import conditions will ordinarily be held to create the same, for technical words are presumed to be used in their legal sense unless there is a plain intent to the contrary.

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The technical words to which he refers are those mentioned above.

In the American & Eng. Enc. of Law, Vol. 6, 501, 502, it is said:

To create a condition, no particular form of words is necessary. Yet certain words, namely, "upon condition," "so that," and "provided," or their Latin equivalents are recognized as *apt and customary*. * * * If a condition is not created by one of the recognized terms, it should be followed by a clause of re-entry or a provision of forfeiture.

(Washburn on Real Property, Vol. 2, Secs. 938, 956; Tiffany on Real Property, Vol. 1, 162; Tiedeman on Real Property, 3d ed., Sec. 201; Stanley v. Colt, 5 Wall. 119; Adams v. Valentine, 33 Fed. 1; Mahoning County v. Young, 59 Fed. 96; Adams v. Ore Knob Copper Co., 7 Fed. 634, 640.)

Second. Apparent exceptions.

There are a number of cases which apparently constitute an exception to the foregoing rules, but a careful analysis of them will disclose that they are not in conflict. They may be divided into the following classes: .

(1) Those in which it was urged that the estate was upon a condition subsequent, but in which no words such as "provided," or "on condition," were

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used. *Wright v. Morgan*, 191 U. S. 55, illustrates this class.

(2) Cases in which the words “provided that,” or “upon condition” were used, but in connection with other words showing the grantor did not use them in their usual sense.

These cases deserve a little closer examination than those of the first class, and may be divided thus:

(a) Cases in which the grantor, being a trustee, was without authority to impose conditions; or the grantee was without authority to assume the burdens of conditions. *Sohier v. Trinity Church*, 109 Mass. 1, is typical of this class. There lands were held by a trustee and the limitations of the trust expressed or by necessary implication prohibited the imposition of conditions.

(b) Cases involving the interpretation of wills, the rule as to which differs from that as to private grants. *Stanley v. Colt*, 5 Wall. 119, is characteristic of this class. The devise in that case was followed by this provision:

Provided that said real estate be not ever hereafter sold or disposed of, but the same be leased or let, and the annual rents or profits thereof applied to the use and benefit of said society.

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If this condition had been treated as a condition subsequent, it would have resulted in defeating the evident purpose of the devise. The court, in considering it, said:

As we have seen, a condition, if broken, forfeits the estate, and forever thereafter deprives the society of the gift. * * * On the other hand, if these limitations are to be regarded as regulations to guide the trustees, and explanatory of the terms upon which the devise has been made, they create a trust which those who took the estate are bound to perform; and in case of a breach, a court of equity will interpose and enforce performance. The estate is thus preserved and devoted to the objects of the charity or bounty of the testator, even in case of a violation of the limitations annexed to it.

The court very properly held that the testator could not have intended to impose a condition which would defeat the purpose which he desired to serve.

In the case at bar a holding that the estate was upon a condition subsequent would not defeat the purpose of the grantor, but would subserve it.

(c) Cases involving grants to municipal corporations or charitable institutions in which provisions, conditional in form, restricted the use of lands granted to some specific purpose, such as a burial ground or the like.

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The case of *Portland v. Terwillinger*, 16 Ore. 465, comes within this class. The land was conveyed to the City of Portland as a resting place for the dead. If the condition had been enforced the land would have reverted to the grantor, the defendant in the case. Speaking to this point the court said:

The defendant would again become re-invested with the estate, including the tombs and their contents, and might exercise such control and dominion over them as any other private property is subject to. I feel safe in saying that such was not the intention of the parties to these writings at the time they were executed, and change of circumstances since they were made cannot affect their construction.

Green v. O'Connor, 18 R. I. 56, is another case which falls within this class. In that case property was granted to the town of Providence upon condition that it be used for the purpose of a highway. There was a statute of Rhode Island prohibiting a town from obligating itself to maintain or repair a highway; it was presumed, of course, that the grantor knew this and, hence, that it was not his intention to impose upon the town a condition which the law prohibited it from fulfilling. Unless the decision can be said to rest on this ground it is an exception to the rule with respect to grants to municipalities on condition that the land be used perpetu-

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ally for the purpose of a street. In *May v. Boston*, 158 Mass. 21, and *Rose v. Hawley*, 118 N. Y. 502, such a grant was held to be upon a condition subsequent.

(d) Cases involving grants containing provisions conditional in form, but which inure to the benefit of some person other than the grantor or his heirs.

The general rule is that grants upon condition for the benefit of some persons other than the grantor or his heirs are not treated as conditional estates. The case of *Countryman v. Deck*, 13 Abbott's Cases, N. Y., 110, belongs to this class. The condition in that case reads:

Provided always that the party of the second part shall fence and keep fenced the premises above described.

It was held that this proviso constituted a covenant running with the land, because the manifest intention of the parties was that it should benefit the grantee and his grantees and not the grantor or his heirs. They had no direct and exclusive interest in the preservation of the fence; and since they had not the court reached the conclusion that it was not the intention of the parties that the grantee should lose his estate if he failed to build or keep up the fence. The Government has a direct and exclusive

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interest in the enforcement of the actual settlers provision. It represented the public and the condition was made for the benefit of the public. No one else could enforce it and, hence, the inevitable conclusion that it was intended as a condition subsequent.

(e) Cases involving grants containing provisions conditional in form, but which, if construed to be conditions, would nullify other provisions of the grant. The case of *Episcopal City Mission v. Appleton*, 117 Mass. 326, exemplifies this class.

Is there any room for the application of such a rule in the case at bar? Section 2 of the act of 1866 provides that,

The lands herein granted shall be applied to the building of said road within the states respectively, wherein they are situated.

Defendants insist that this provision cannot be given effect if the condition subsequent theory prevails, hence, that there is an inconsistency. If so, it is only such an inconsistency as exists in every grant upon condition subsequent. If the condition be enforced in case of breach, the grantee will not, of course, be permitted to continue in the enjoyment of the grant. If such an inconsistency would prevent the enforcement of the condition subsequent here, such a condition would be futile in every case.

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(f) Cases in which conditions have been held to be void, on grounds of public policy, etc.

Conditions in total restraint of the power of alienation are held void and unenforcible, although conditions restraining the power of alienation for a limited period, or as to a particular class of persons are held valid. (Washburn on Real Property, Vol. 2, Sec. 944; Devlin on Deeds, Sec. 965; Warvelle on Vendors, 2 ed., Sec. 451; *Cowell v. Springs Co.*, 100 U. S. 55, 57; *Langdon v. Ingram*, 28 Ind. 360; *McWilliams v. Nisly*, 2 Serg. & R. 507.)

In *Taylor v. Brown*, 147 U. S. 640, 646, the court said:

The power of free alienation is incident to an estate in fee simple, but a condition in a grant preventing alienation to a limited extent or for a certain and reasonable time may be valid, and the grantee forfeits his estate by violating it.

Even a total restraint of power of alienation is valid in case of public grants, although invalid in case of private grants. (*Sheppard's Touchstone*, 130.)

But, of course, such cases as these can have no application to a grant like the one we are considering. It will not do to say that an act of Congress, making a gift to a grantee upon condition that it do certain things, is against public policy.

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Every case in which the use of the words “provided,” or “upon condition,” were held not to import conclusively a condition subsequent, falls within some one of the foregoing classes and has no application to the case at bar.

Third. Cases in which the general rule has been applied and enforced.

Wherever the grant or the deed, as the case may be, introduce the condition by the words “provided” or “upon condition,” the estate has been held to be one upon condition, unless other language in the deed made it *clear* that the parties did not so intend.

In *Adams v. Valentine*, 33 Fed. 1, the court construed a deed, containing a condition opening with the word “provided.” It was asked to say that the deed fell within an exception to the general rule with respect to conditions subsequent. In answering this Judge Wallace said:

Nothing could be plainer or more peremptory than the words in the latter deed, “provided and this deed is upon condition that.” There is no room for construction, and there is nothing in the context of either of these deeds, which warrants any other than the ordinary meaning of the language employed.

Referring to the decisions which had been submitted to him in support of the opposite contention, he said:

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The instrument considered by the court in each of these cases contained language from which it was reasonable to infer that the clause under consideration was not intended to operate as a condition.

Ergo, where the instrument does not contain such language the general rule must apply. And that is what we are contending for here.

In *Clapp v. Wilder*, 176 Mass. 332, 335, where a similar question was under review, the court said:

The common law as to the creation of conditional estates has always been considered a part of our common law. *If we are to have such estates it is important that there should be the least possible uncertainty as to the form of the language to be used in creating them*; and when we find in a deed an intensified form of the phrase which from the earliest times has been regarded as “the most express and proper” phrase by which to create such an estate, it is to be assumed, in the absence of anything appearing in the deed to the contrary, that the phrase is used for its proper legal purpose, namely, to create such an estate, and that such an estate is thereby created. No doubt there is a disposition among courts to look for something in the deed which shall modify the severity of the language; and *sometimes considerable*

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astuteness has been exercised in this direction (Post v. Weil, 115 N. Y. 361); and no doubt the language is sometimes used when, from the whole deed, it sufficiently appears that it could not have been intended in its full technical sense, and in such cases a restriction and not a technical condition is the result.

Concluding the discussion upon this point the court said:

The case at bar does not come within any exception to the general rule as to the legal meaning of the phrase “upon express condition.” As stated by Parker, C. J., in Gray v. Blanchard (8 Pick. 283, 287), the words, “this conveyance is upon condition” can mean nothing more nor less, than their natural import.
* * * It would be quite as well to say that the words mean nothing, and so ought to be rejected altogether (p. 337).

In Blanchard v. Detroit, etc., R. Co., 31 Mich. 43, 48, 50, a conveyance was made “in consideration of \$500.00 and the covenant to build a depot hereinafter mentioned.” The so-called covenant reads:

But this conveyance is upon the express condition that the said railroad company shall build, erect and maintain a depot or station house on the land herein described, etc.

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It will be noticed that this provision is referred to as a covenant, but the court, looking to the intention of the parties, held that it was a condition subsequent. It said:

Where, however, the terms are distinctly and plainly terms of condition, where the whole provision precisely satisfies the requirements of the definition, and where the transaction has nothing in its nature to create any incongruity, there is no room for refinement, and no ground for refusing to assign to the subject its predetermined legal character. In such a case the law attaches to the act and ascribes to it a definite significance, and the parties cannot be heard to say, where there is no imposition, no fraud, no mistake, that, although they deliberately made a condition, and nothing but a condition, they yet meant that it should be exactly as a covenant (p. 51).

In *Hammond v. Railroad Co.*, 15 S. C. 10, 32, the deed under examination had these words, "provided always, on condition." Speaking of their effect the court said:

* * * When, then, Hammond has used the very terms which the books lay down as the special terms to be used to create such an estate, and when this was his interest, and nothing was found in the deed to negative the idea that

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it was also his purpose, why resort to implication? Why not take him at what he says? It seems to the court that it would be in violation of all rules of construction to hold otherwise than this deed created an estate upon condition.

In *Pepin County v. Prindle*, 61 Wis. 301, 308, land was conveyed to the County of Pepin “upon the express condition and term that the said County of Pepin erect thereon within five years a court-house for the use of said county, and shall keep and maintain the same thereon for the space of ten years, upon the express condition.” It was urged that the mere maintenance of the building was a sufficient compliance with the condition. The court answered this by saying:

Such a construction would do violence not only to the sense conveyed, but also to the language employed. It would be more narrow and technical than is implied in the word “strict” or “literal”; it would be extremely finical.

In *Langley v. Chapin*, 134 Mass. 82, the deed under consideration provided:

This conveyance is made by us upon condition that the said Corbitant Mills, or its successors, will erect or cause to be erected upon said premises a cotton factory of not less than 20,000 spindles within two years from the date hereof.

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Judge Holmes (now Mr. Justice Holmes), speaking for the court, said of this provision:

There is no doubt that it attaches a condition subsequent to the estate conveyed. The tenant argues that it amounts only to a personal covenant with the grantors. But there is nothing in the context which warrants any other than the natural interpretation of the words used, and we must therefore assume that they mean what they seem to.

From the foregoing cases it is clear that the words "provided," or "upon condition" import a condition subsequent unless there is strong ground for believing that the parties did not so intend.

Even in cases where those words are not used, if it is clear from the context, that it was the intention of the parties to create a condition subsequent the court will so decide.

Wilson v. Wilson, 86 Ind. 472, 474, illustrates this class of cases. In the conveyance construed the word "condition" did not appear. Speaking of this the court said:

The word "condition" is not necessary to the creation of a condition. Any words that convey the proper meaning will be sufficient; and when, as in this case, the conveyance was made upon specified terms, and for no other

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consideration, the terms stated must be regarded as expressive of conditions subsequent, a breach of which might forfeit the estate.

It is true that courts are reluctant to construe *private* grants to be conditional where the formal words are not used. In such cases the intention of the parties must be very clear, or else the court will refuse to hold the estate to be one upon condition.

Fourth. But it is otherwise with respect to public grants.

In *Northern Pacific v. Townsend*, 190 U. S. 267, the language of the granting act was "that the right of way through the public lands be, and the same is hereby, granted to said Northern Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed." Neither the word "provided" or "condition" was employed. In the case of a private grant it is probable that the court would have held that this provision did not create an estate upon condition, but in the case of a public grant it is otherwise. We read from the opinion:

But, although there was a present grant, it was yet subject to conditions expressly stated in the act, and also (to quote the language of the *Baldwin* case, 103 U. S. 426) "to those necessarily implied, such as that the road shall be
 * * * used for the purposes designed."
 * * * In effect the grant (of the right of

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way) was of a *limited fee*, made on an *implied condition* of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted (p. 271).

In *United States v. Michigan*, 190 U. S. 379, 398, the words were “for the purposes aforesaid and no other,” and the court held that they implied “a grant upon condition for a special purpose.”

In *Horner v. Chicago, etc., Ry. Co.*, 38 Wis. 165, 175, the court said:

This deed conveyed two parcels of land. After the description of the first parcel, and referring to it, are the following words: “The aforesaid piece or parcel of land hereby conveyed to the party of the second part only for depot and other railroad purposes.” After the description of the other parcel, which in terms is granted for a railway, the deed contains this clause: “Both of said pieces or parcels being granted solely for said road purposes.” The words “only” and “solely” are words of restriction or exclusion. As used in this deed, their effect clearly is to prohibit the grantee from using the lands for any other than the specified purposes.

Speaking further of the words of restriction used the court said:

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But their insertion was a useless act unless the clauses are held to be conditions. That the grantor intended to reserve to herself some remedy in case the grantee should make default, is too plain for argument or doubt.

So we say in the case at bar.

The decisions in all the foregoing cases, where formal words were not used, turn upon the interest of the grantor. Did he intend the provision for his protection? If so, then it is a condition subsequent. The Government determined to protect itself against a breach by the railroad company. Unless the actual settlers provision is treated as a condition subsequent the Government is without protection.

Fifth. Cases construing provisions similar to the actual settlers provision.

The number of cases in which the provisions similar to those in the act of 1869 were construed are not many.

In *Nichols v. Southern Oregon Co.*, 135 Fed. 232, the proviso in the grant read: "Provided further, that the grant of land hereby made shall be upon the condition that the lands shall be sold to any one person only in quantities not greater than one quarter section and at a price not exceeding \$2.50 per acre." The suit was by a private individual to compel defendant to deed to him a portion of the land upon the terms and at the price specified in the

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grant. The court held that he had no rights under the grant. In the course of the discussion the court observed:

It is not necessary to consider whether this act was a waiver by Congress of the conditions subsequent in the grant.

Was this a *dictum*? The decision of the case required that the court should decide who was entitled to complain of the violations of the act. In doing so it found that complaint could be made only by the Government, because the grant was upon a condition subsequent. True, he spoke of the restrictions placed in the grant as “mere incidents, mere regulations,” but these are the same things which he afterwards denominated a condition subsequent.

In *Warrior River Coal and Land Co. v. Alabama State Land Co.*, 154 Ala. 135, the court interpreted the provisions of the act of April 10, 1869, renewing the grant to the State of Alabama under the act of June 3, 1856. This of course is not the act involved in the present suit, although bearing the same date. Its provisions, however, with respect to the sale of land, are the same:

Provided that the land mentioned by the act hereby revived, except mineral lands, shall be sold to actual settlers only, in quantities not greater than one quarter section to any one person and at a price not exceeding \$2.50 per acre.

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The court, speaking of the limitation quoted, said that it:

was at most, a condition subsequent, a violation of which rendered the estate in the particular instance amenable to forfeiture by the appropriate action of the granting government, and by that only.

It may be this was *obiter*, but whether or not it was, it discloses the views of the court upon the subject, and for that reason is worthy of consideration in the matter which we are discussing.

Sixth. Cases construing provisions of public grants analogous to the case at bar.

There are a number of decisions construing provisions of public grants affirmatively requiring the settlement of the granted lands, by or the disposition of them to settlers. The provisions are in the form of a condition subsequent, and the courts sustain the natural and ordinary meaning of the words employed; in other words applied the general rule invoked by the Government in the case at bar. To illustrate:

In *Chapman v. Pingree* (67 Me. 198) a provision in a grant (in the ordinary language of a condition subsequent) requiring that the grantee should settle twenty-five families on the granted lands within a specified time, was held to be a valid condition.

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In *United States v. Repentigny* (5 Wall. 211) a provision in one of the old French grants requiring the settlement and improvement of the lands granted and the occupation thereof by the tenants of the grantee was sustained and enforced as a condition subsequent; and the lands were held to have been forfeited to the United States, as the successor of the King of France, because of a breach of such condition.

In *United States v. Wiggins* (39 U. S. 334) a provision in one of the old Spanish grants, in the form of a condition requiring settlement and improvement of the lands granted, was held to be a condition subsequent and enforced as such; and it was held that the United States, as the successor of the King of Spain, the original grantor, was entitled to forfeit the estate.

In *United States v. Arredondo* (31 U. S. 689) a provision in another old Spanish grant, in the form of a condition requiring the settlement of two hundred Spanish families upon the granted lands, was held to be a condition subsequent. In this case failure to perform the condition was excused, because rendered impossible of performance by a change of sovereignty before the expiration of the time prescribed for the settlement of the lands.

Conditions requiring settlement of the granted lands were common in the old French and Spanish

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grants. And it has never been contended or held that there was any ground for converting those conditions (which were *enforcible*) into mere personal covenants (which would be *unenforcible*).

Seventh. Provisions construing private grants analogous to the case at bar.

There are many cases in which provisions in private grants, similar to the actual settlers provision, were held to be conditions subsequent. Those grants contain provisions requiring or prohibiting the use of the granted lands in a certain manner or for a certain purpose. The authorities are practically unanimous that where these restrictions are expressed in the form of a condition, as for instance by the use of conditional words such as "provided" or "on condition," they will be enforced as conditions. (Cowell v. Springs Co., 100 U. S. 55; Adams v. Valentine, 33 Fed. 1; Gray v. Blanchard, 8 Pick. 284, 287; Blanchard v. Detroit, etc., 31 Mich. 43, 48; Langley v. Chapin, 134 Mass. 82; Marston v. Marston, 47 Me. 495; May v. Boston, 158 Mass. 21; A. & E. Enc. of Law, vol. 6, p. 513 and cases cited; Tiedeman on Real Property (3d ed.), sec. 205.

Eighth. Rule disfavoring conditional estates not applicable to public grants.

In the case of private grants courts will try to avoid decreeing forfeiture wherever possible. This comes (1) largely from the desire to protect the

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weak against the strong, to guard the ignorant and unsuspecting against the unconscionable devices of those more learned and cunning. And (2) because of the desire to avoid the insecurity and uncertainty resulting from the existence of defeasible estates. But the enactments of Congress cannot be discounted upon either of these grounds. The judiciary has no duty to review the policy or wisdom of congressional acts where they are within the constitutional power of Congress. The condition created by the actual settlers provision, was designed to conserve the public welfare. It does not create permanent conditional estates. Its object is to prevent an undesirable distribution of the granted lands. It will not do to say, in construing grants by Congress, that the common law required this or that, and that Congress did not observe the requirement. The legislative branch of the Government may modify or even reverse the common law. When Congress by the use of appropriate words indicates a condition to a public grant, it becomes the law. How ridiculous it would be to say, after Congress has created a conditional estate, that such estate is not favored by the law. What Congress enacts, within its constitutional power, the law necessarily favors.

In *Farnsworth v. Minnesota*, 92 U. S. 49, 68, it was expressly decided that the general doctrine dis-

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favoring conditions and forfeitures is applicable to private contracts, but *not* to public laws. It held that equity would enforce forfeiture in favor of the public upon grounds of public policy, and quoted with approval these words of Lord Macclesfield:

You can never say that the law has determined hardly, but you may that the party has made a hard bargain.

The most careful research has failed to discover a single decision in which a provision in a public grant, such as we have here, was held not to be a condition subsequent.

Do the cases of *Morgan v. Rogers*, 79 Fed. 377, and *Davis v. Gray*, 16 Wall. 203, so hold? No. In *Morgan v. Rogers*, the grant recited that the lands were "to be held and used as a burial ground for said city and vicinity." The court said that these words constituted a mere statement of the reasons which induced Congress to make a grant of that exceptional character. It will be noted, however, that the grant did not contain the formal words found in the actual settlers provision. In *Davis v. Gray*, the grant involved was one from the State of Texas to aid in the construction of a railroad. The court held that the performance of the condition was rendered impossible by the State of Texas joining in the rebellion, and then said:

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Here the controlling consideration is, that the performance of all the conditions not performed was prevented by the State herself. By plunging into war, and prosecuting it, she confessedly rendered it impossible for the company to fulfill during its continuance.

Manifestly these cases do not militate in the least against the Government's position. They are entirely consistent with it. We repeat, no case can be found in which the rule disfavoring conditional estates was held to be applicable to public grants.

IV.

BREACHES OF CONDITIONS IN ACTUAL SETTLERS PROVISION.

Under which will be discussed the character and extent of the transactions charged to be in violation and breach of the conditions restricting the manner of selling the granted lands, and certain excuses of the defendants.

First. Unlawful sales and time thereof.

In selling the granted lands the railroad company has always ignored the restrictions imposed by Congress. The lands have been disposed of solely with the object of deriving the greatest possible financial benefit therefrom. Many sales have been made to speculators in quantities from 1,000 to

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20,000 acres to a single purchaser, and for prices ranging from \$5 to \$40 per acre and one sale of 45,000 acres was made to one person at \$7.00 per acre. (Ante. p. 93.)

Of the granted lands, approximately 5,306 sales have been made, aggregating approximately 820,000 acres. Of this amount, about 524,000 acres were sold to 376 purchasers in quantities exceeding one quarter section to one purchaser. Substantially all of the 524,000 acres were sold to speculators. Of the 524,000 acres, approximately 370,000 acres were sold to 38 purchasers in quantities exceeding 2,000 acres to one purchaser. (Ante. p. 94.)

For many years the limited demand for the lands furnished comparatively few opportunities to violate the terms of the grant, and thus it transpired that until about the year 1894, nearly all of the lands disposed of were sold in substantial compliance therewith. Yet during that period there were a few sales in quantities from 400 to 1,000 acres to a single purchaser. (Ante. p. 93.)

However, nearly all of the large violations have taken place since the year 1894, and after an active demand for the lands by speculators, in large quantities, had been developed by the Southern Pacific Company.

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Second. Trust deeds and mortgages.

The trust deed of June 2, 1881, purporting to create some preferential interest in the granted lands in favor of the owners of the so-called preferred capital stock of the Oregon and California Railroad Company, in terms confers upon the trustees the power to sell and dispose of the lands in violation of the conditions of the grants. It therefore constitutes a breach of the conditions. The same is true of the Union Trust mortgage of July 1, 1887. (Ante. p. 92.)

Third. Lands conveyed in effect to Southern Pacific Company.

The proof shows that through the manipulation of corporate securities and the maintenance of the Oregon and California Railroad Company as a dummy corporation to serve the defendant Southern Pacific Company, the entire land grant has been appropriated to the use and benefit of the latter company. The Southern Pacific Company has assumed and exercised all of the rights of ownership of the granted lands. Nominally, the title remains in the defendant Oregon and California Railroad Company, but this does not affect the actual nature of the transaction. The practical effect of the transaction is the same as if all the granted lands now remaining unsold had been conveyed to the Southern Pacific Company. If a dummy corporation is maintained to enable another corporation to exercise and enjoy certain franchises and other

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rights of property, the courts will inquire into the transaction and treat it the same as if the dominating corporation were the legal owner of the property held in the name of the dummy corporation. *Cook on Stock and Stockholders*, secs. 6, 663a, 857; *Vilas v. Page*, 106 N. Y. 439; *Bennett v. Minott*, 28 Oreg, 339; *San Francisco v. Bee*, 48 Cal. 398; *Barksdale v. Finney*, 14 Grat. (Va.), 338; *Metcalf v. Arnold*, 110 Ala. 108; *Van Campen v. Ingram*, 12 Atl. Rep. (N. J.) 537; *Terhune v. Skinner*, 45 N. J. Eq. 344.

Consequently the situation is, in legal effect, the same as if the unsold lands, aggregating approximately 2,360,492 acres, had been sold to the Southern Pacific Company. In any event the withdrawal of the lands from sale and the refusal to entertain applications therefor by actual settlers, constitute a further breach of the restrictions. (Ante. p. 95.)

Further discussion of this question for the purpose of showing that defendants breached the conditions of the grant is unnecessary. They frankly admit it. We take the following from the record:

MR. FENTON: Defendants admit that they would not have paid any attention to the proviso of April 10, 1869.

MR. TOWNSEND: Nor to the similar provision of May 4, 1870?

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MR. FENTON: Or to section 4 of the act of May 4, 1870, with respect to the limitation upon the grant. (R. V.-2369.)

In addition, the answers admit, substantially, all the acts charged by the complainant as breaches.

Fourth. The effect of these breaches.

The immediate effect of the transactions hereinbefore referred to is to create a virtual land monopoly affecting the territory within 35 or 40 miles of the Oregon and California Railroad line, and particularly from Eugene to the southern boundary line of the State. Substantially every alternate section is held in a single proprietorship. Industrial development is controlled by the railroad company. That in forty years every alternate section of land in southwestern Oregon should be held in a single proprietorship to serve selfish interests, without regard to the commercial and industrial development of the territory in which the lands are situated, is the specific evil, in a grossly aggravated form, that Congress intended to prohibit. It is unnecessary to elaborate upon this phase of the case. The court is referred to the observation of the Supreme Court, when considering the comparatively feeble provision of the Union Pacific grant, it said:

Anyone who has lived in a community where large bodies of land are withheld from use or

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occupation, or from sale except at exorbitant prices, will recognize the value of this provision. (Railway Company v. Prescott, 83 U. S. 603.)

Fifth. Excuses made by defendants for disregarding restrictions of the actual settlers provision.

(a) *Impossibility of performance.*

Much testimony was put into the record by the defendants upon the character of the land for the purpose of showing the land was not susceptible of actual settlement and therefore that the actual settlers provision is inapplicable. The government objected to all such testimony on the ground that it was immaterial, irrelevant and incompetent (Ante. p. 101) and still insists upon the objection.

When the grantees accepted the grants they knew the condition of the lands. The same hills were there that appear in their photographic exhibits. Substantially the same character of timber covered the surface. The grantees knew then as well as they know now the uses to which the lands could be put. If they were not susceptible of actual settlement or the grantees had any doubt about it, the grantees should have protected themselves either by not accepting the grants or by asking to have them amended; not having done so they are bound by their terms. In *Ingle v. Jones*, 69 U. S. 763, the defendant in error had made a contract to construct a building and "make it fit for use and occupation."

DEFENDANTS MEND THEIR HOLD.

Defendants stipulated that they withdrew the land from sale and refused to accept applications to purchase "claiming that all the lands so applied for are essentially timber lands, unsuitable for any other purpose" (Stip. IV-1582). This was their position before litigation commenced. They now urge numerous other reasons for withdrawing the land from sale. This they cannot do. In *Ohio and Miss. Ry. Co. v McCarthy*, 96 U.S. 258, it is said,

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy he cannot, after litigation has begun, change his mind and put his conduct upon another and different consideration. He is not permitted thus to mend his hold; he is estopped from doing it by a settled principle of law."

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He built it, as provided in his agreement, but owing to a latent defect in the soil upon which the foundation rested the building cracked and part of it threatened to fall. This made it necessary to take the building down and rebuild the structure, which was done at a large expense. The contractor, defendant in error, contended that having fulfilled his contract, he was not responsible for defects arising from a cause of which he was ignorant and which he had no agency in producing and therefore was entitled to recover the balance due upon the contract. The court in denying his claim said:

This covenant it was his duty to fulfill, and he was bound to do whatever was necessary to its performance. Against the hardship of the case he might have guarded by a provision in the contract. Not having done so, it is not in the power of this court to relieve him. He did not make that part of the building "fit for use and occupation." It could not be occupied with safety to the lives of the inmates. It is a well settled rule of law, that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him. (Citing authorities.)

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(b) *In any event the terms with respect to the quantity and price are enforceable.*

Assume for the purpose of the argument that these lands are incapable of cultivation, and that this fact would excuse the defendants from selling to actual settlers. It would by no means follow that the defendants would also be excused from observing the other restrictions, namely, those with respect to the quantity that might be sold to one person at a sum not to exceed \$2.50 per acre. These conditions are not impossible of performance, yet the defendants have ignored them.

Is there any warrant in the legislation of Congress for assuming that if these lands be incapable of cultivation the grantees may sell them in such quantities and at such prices as they please without any reference to the restrictions of the grant? We have shown (*Ante*. p. 153 *et seq.*) what the policy of the government was with respect to the disposition of the public domain at the time the acts of 1869 and 1870 were passed. No support can be found in that policy for the contention that if these lands be timber lands Congress did not intend to put any restraint upon the grantees with respect to their disposition.

In addition to what we have already said upon this question, we invite attention to the act governing the sale of timber and stone lands in California,

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Oregon, Nevada and in Washington Territory, approved June 3, 1878. It provides:

That surveyed public lands of the United States within the states of California, Oregon, and Nevada * * * may be sold to citizens of the United States * * * in quantities not exceeding 160 acres to any one person or association of persons, at the minimum price of two dollars and fifty cents per acre; and lands valuable chiefly for stone may be sold on the same terms as timber lands.

It further provides:

That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate * * * setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone * * * that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself.

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This shows not only the policy but the practice of the government with respect to timber and stone lands.

Another act that is very pertinent. On March 3, 1869, a little more than a month before the amendatory act of 1869 was enacted, Congress passed what is known as the "Coos Bay Military Wagonroad Grant" to aid in the construction of a wagon-road from Roseburg to Coos Bay in Oregon. When this bill was under discussion Senator Williams of Oregon said:

I have a map here, and can exhibit the condition of the country and the situation of the points referred to if the Senator desires to look at it; but I will state to the Senator that Roseburg is the county seat of Douglas County, and the chief town of the Umpqua valley. It is surrounded on all sides by mountains. This bill proposes to assist in the construction of a road from Roseburg to the navigable waters of Coos Bay. * * * There are some small valleys in these mountains in which the land may be worth something, and it is possible that there may be some timber on the mountains that may be used by the State in the construction of this road with advantage. (Cong. Globe, pp. 249-250.)

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Notwithstanding this description, Congress embodied in the act the following provision:

Provided, further, that the grant of land hereby made shall be upon the condition that the lands shall be sold to any one person only in quantities not greater than one quarter section and at prices not exceeding \$2.50 per acre. (15 Stat. 340.)

There is nothing there about actual settlers, yet the quantity that might be sold to one person and the price per acre are limited.

So, if we say these lands are chiefly timber lands that would not justify the conclusion that Congress did not intend to apply to them the limitations with respect to the quantity and the price expressed in the actual settlers provision of the grants of 1869 and 1870.

Moreover if Congress intended to exempt the timber lands it would have used apt words to do so—it would not have left the matter to surmise. It excepted mineral lands from the operations of the grants, hence it considered lands which it did not wish to come within the scope of the acts. It knew, too, that these lands had timber on them, because it granted by section 10 of the act of 1866 so much of the timber on the excepted mineral lands as the grantees might need in the work of construction (Ante. p. 41). Notwithstanding all this Congress

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did not except the timber lands. Are we justified, therefore, in concluding that Congress did not intend to exempt them, but did intend that they should be subject to all the restrictions of the acts of 1866, 1869 and 1870.

(c) *But the lands are susceptible of actual settlement.*

While insisting that the character of the lands is immaterial, we contend that the evidence shows overwhelmingly that they are susceptible of settlement (we have discussed the question as to what is meant by actual settlement, Ante. p. 136, and will not repeat our argument here). The defendants called thirty-three witnesses upon the character of the lands. A large number of them were persons who had been sent upon the lands by the Railroad Company for the purpose of gathering testimony favorable to their employer after the agitation for the recovery of the lands had commenced. To say the least, those who were thus sent were deeply interested and their testimony should be considered in the light of that fact. They said that from four to sixty per cent of the land when cleared would be fit for agricultural purposes and the balance for grazing (Ante. p. 103). This does not comport with the contention that none of these lands, or practically none of them, is susceptible to actual settlement or cultivation. On the other hand the government

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produced seventy witnesses—men who were familiar with the land through residence in the neighborhood and who were entirely disinterested excepting insofar as they might have desired to see the law enforced and the rights of the government vindicated. Forty-five of them said that all of the land was fit for settlement. The remaining twenty-two put the percentage a little lower. If the court should undertake to weigh the testimony of these men against that of the defendants' witnesses it seems to us that the contention of the defendants that these lands are not susceptible to settlement must inevitably fail.

In addition, the defendants' witnesses testified that there were from four million to twenty-five million feet of timber on each quarter section and that it was worth from \$1.00 to \$2.50 per thousand feet to lumber companies which would remove it without expense to the owners of the land. This means that a quarter section of land purchased for \$400.00, assuming that the maximum price of \$2.50 per acre was paid, would bring from \$4,000 to \$62,500 (*Ante*. p. 104); such a sum would go a long ways towards paying for the removing of the stumps and the clearing of the land. Under these circumstances who can doubt that the lands would be rapidly settled if the Railroad Company com-

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plied with the terms of its contract with the government.

But there is other persuasive testimony that these lands are fit for agricultural purposes. The defendants contend that they are chiefly timber lands. Very well; lands which will grow timber will grow fruit trees, grain, and other agricultural products. This must be manifest. Surely such lands cannot be classed as arid. The admission, therefore, that they are chiefly timber lands proves conclusively that when cleared they will be fit for agricultural purposes.

In addition we have the uncontradicted testimony of Mr. McAllaster, Land Commissioner of the defendant company, that 10,000 people, between the years 1907 and 1912 had applied to the company to purchase sections of this land for the purpose of cultivating the same and building homes thereon. He said:

About 10,000 applications to purchase quarter sections of timber lands belonging to the company at \$2.50 per acre have been made to the company and refused since the commencement of the first Lafferty suit, about that time, up to July 30, 1912. (R. IV-1958, 9.)

True, he added that in his judgment these applicants were not in good faith. In passing, we may

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remark with respect to this, that it has been the fashion during many years for the representatives of large corporations when called to account by the government for violations of law, to charge bad faith. They seemed to think that they had the right to flout the laws of the nation and that if anyone had the temerity to complain he must necessarily have been in bad faith. But that time is rapidly passing. For years large aggregations of wealth under corporate forms were permitted to ignore the laws; it is so no longer. In every quarter there is a demand that they be required to yield obedience to the will of the State as other citizens are required to do. And the charge that men who seek to make them do so are actuated by bad faith has lost its potency. If Mr. McAllister doubted the good faith of the 10,000 applicants he could have put it to the test in a very simple way, namely, by accepting the money tendered by them, or by offering to accept it. If upon doing the latter the offer was withdrawn he would have more convincing proof of bad faith than he has now.

Besides, we have a stipulation solemnly entered into that 4,000 persons had applied for permission to actually settle upon this land and pay for it at the maximum price of \$2.50 per acre, and that their applications were denied (*Ante* p. 95). In view

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of these facts how futile it is to argue that the lands are not susceptible of actual settlement. Such a contention must fall upon ears that are deaf while the 10,000 applicants who seek access to the lands knock for admission upon doors that are barred against them by the defendants. Let the Railroad Company put these lands upon the market for sale within the terms of the grants and it will be demonstrated within a short time that there are thousands upon thousands of people who are willing to take them and establish their abodes thereon. If that were done what is now a wilderness would become a land of homes filled with happy and prosperous people.

V.

REMEDIES—JURISDICTION.

Under which will be discussed the remedies available to the Government and the question of jurisdiction raised by the defendants.

Is forfeiture the proper remedy and has equity jurisdiction to decree it? Defendants contended:

First. That forfeiture could not be resorted to without (a) declaration of forfeiture by Congress, and (b) a judicial proceeding thereafter analogous to the proceeding known at common law as "inquest of office."

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Second. That equity should refuse to entertain this suit because the principal object thereof is to enforce a forfeiture.

Third. That the suit should not be entertained as one to quiet title, because such a suit can be maintained only when the plaintiff has both legal title and possession.

We shall consider these propositions in the order named.

First. This suit may be maintained without inquest of office; the act of Congress authorizing the Attorney-General to bring it is sufficient.

(a) *Underlying principles of conditional estates.*

The theory of conditional estates is, that the grantor parts with the title reserving the right to recall the same upon the happening of the contingency named. Therefore, a condition subsequent is not self-executing. It rests with the grantor to say whether the condition shall become operative after the happening of the contingency. And so, a violation of a condition does not terminate the estate of the grantee, unless the grantor so elects. Conditions are designed for the benefit of the grantor, not for the benefit of the grantee.

Conditional estates being of feudal origin, the early rules defining the rights and remedies incident to conditional estates were influenced by the

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general doctrines of feudal tenures. Originally a freehold estate could be created only by *feoffment* with *livery of seisin*. Therefore it was held that it could be terminated only by some act of equal notoriety and solemnity. Thus it became the rule that the grantor could exercise the right of election to forfeit a freehold estate for breach of a condition only by an actual entry upon the land. Such entry being considered the equivalent of the livery of seisin by which the estate had been created. (Tiffany on Real Property, vol. 1, sec. 74; Davis v. Gray, 16 Wall. 203, 230; Cornelius v. Ivins, 26 N. J. L. 376, 386.)

(b) *Modern rule upon the subject.*

In time grants became recognized as a proper method of creating and conveying freehold estates. Livery of seisin not being required in the case of grants, the reason for the original rule requiring actual entry in case of a breach of a condition disappeared and with it the rule itself.

In Schlesinger v. Railway Company, 152 U. S. 444, the court said:

In the case of a private grant, an entry by the grantor, or *any part equivalent thereto, showing a purpose to take advantage of the breach of condition subsequent, and to reclaim the estate forfeited by such breach, is all that is required.* (p. 453.)

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In *Union Pacific v. Cook*, 98 Fed. 281, 284, Judge Thayer, speaking for the Circuit Court of Appeals, said:

It is true, no doubt, that the grantor of an estate upon a condition subsequent is no longer bound to make a formal entry for breach of the condition, but may sue to recover the possession if the condition is not fulfilled within the time limited. According to the modern view, the *commencement of a suit in ejectment by the grantor takes the place of a formal entry and demand of possession.* (*Cowell v. Springs Co.*, 100 U. S. 55, 58; *Ruch v. Rock Island*, 97 U. S. 693, 697; *Austin v. Cambridgeport Parish*, 21 Pick. 215, 224; *Cornelius v. Ivins*, 26 N. J. Law, 376, 386; *Jackson v. Crysler*, 1 Johns. Cas. 125; *Tied. Real Prop.*, Sec. 277; *Hopk. Real Prop.* p. 174.)

(c) *Rules defining the manner in which the right of forfeiture for breach of a condition subsequent might be exercised by the King of Great Britain.*

In England it became the general doctrine that the right to forfeit an estate for breach of a condition annexed thereto could be exercised by the King only by a special proceeding known as “inquest of office.” If the inquest resulted in favor of the Crown, the finding of the jury was known as “office

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found," and the legal effect thereof was the same as a re-entry by an individual. This rule was not absolute. Under certain circumstances, an inquest of office was not necessary, as we shall see in a moment.

(d) *Inquest of office—where necessary.*

It would serve no useful purpose to investigate the origin and trace the development of the proceeding known as "inquest of office." Let it be sufficient to say that in the course of time it became established that where the right of the King to the possession of lands appeared as a matter of *record*, no inquest of office was necessary, and the King's possession was presumed from the mere existence of the record showing the right. (Viner's Abridgement, title "Office or Inquisition," [G 2] 6, vol. 16, page 88; Bacon's Abridgement, title "Prerogatives," vol. 8, page 100; Chitty's Prerogatives of the Crown, page 249.)

Therefore, in a case such as the one at bar, inquest of office would not have been necessary under the old common law. The grant to the railroad company was by a public statute and appeared of record. The conveyances by the defendant in violations of the conditions of the grant appeared of record in the State of Oregon. Consequently, even if the doctrine of inquest of office be in force here, there was no occasion for its application. But, as

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we shall see, inquest of office is a proceeding not applicable to the Government of the United States.

(c) *Inquest of office, how initiated.*

There were two officers of the Crown who, by virtue of their office, had general authority to institute inquests of office on behalf of the Crown, viz., the sheriff and the coroner. Either of these officers might at any time summon a jury and submit to them either general or specific questions concerning the property rights of the King. But they were not the only ones possessing this power. A court of *chancery* had the power to appoint special inquisitors, when it was thought necessary, but in each case their duties were the same as those selected by the sheriff or coroner. They conducted a mere investigation and returned their findings to a court of *chancery*.

(f) *General nature of the proceeding.*

Inquests of office were not trials in any sense of the word. The verdicts returned did not possess any of the elements of a judgment or decree. There were no pleadings. The proceedings were based, not upon an allegation, but upon an inquiry. It was not necessary, in order to conduct an inquest of office, to acquire jurisdiction either as to parties or as to the subject-matter. An inquest of office was in every sense analogous to the modern coroner's inquest. In fact, coroners' inquests were inquests of

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office at the common law. A verdict favorable to the Crown did not assume to adjudicate the rights of the Crown.

In *Phillips v. Moore*, 100 U. S. 208, 212, the court thus described the legal effect of an “office found”:

It removed the fact upon the existence of which the law divests the estate and transfers it to the Government, from the region of uncertainty, and makes it a matter of record.

(Chitty’s *Prerogatives of the Crown*, p. 59; Blackstone’s *Commentaries*, Book III, p. 259; Pollock and Maitland’s *History of English Law*, vol. 1, p. 119-122; Gilbert’s *History of the Exchequer*, p. 109, 132, *et seq.*; *Hamilton v. Brown*, 161 U. S. 256, 263.)

(g) *The manner in which right of forfeiture for breach of conditions may be exercised by the United States.*

The law requires from the Government only such act as will show its intention to avail itself of the condition. This can be done only by Congress. Sometimes Congress manifests the intent by passing an act declaring a forfeiture; in other instances, as here, it authorizes a suit to be brought to have the forfeiture declared and the condition enforced. The method of procedure has been passed upon often by

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the Supreme Court and in no case was it held that inquest of office, or anything similar to it, was necessary before commencing the action.

In *United States v. Repentigny* (72 U. S. 211) the court said:

A legislative act, directing the possession and appropriation of the land, is equivalent to office found. The mode of asserting or of assuming the forfeited grant, is subject to the legislative authority of the Government. It may be after judicial investigation, or by taking possession directly, under authority of the Government, without these preliminary proceedings.

In *Schulenberg v. Harriman*, 88 U. S. 44, we read:

If the grant be a public one, it must be asserted by judicial proceedings *authorized by law*, the equivalent of an inquest of office at common law, finding the fact of forfeiture and *adjudging the restoration of the estate* on that ground, *or there must be some legislative assertion of the ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement.*

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In *Farnsworth v. Minnesota*, 92 U. S. 49, it was said:

A forfeiture by the State of an interest in lands and connected franchises granted for the construction of a public work may be declared for noncompliance with the conditions annexed to their grant, or to their possession, when the forfeiture is provided by statute, without judicial proceedings to ascertain and determine the failure of the grantee to perform the conditions. Such mode of ascertainment and determination—that is, by judicial proceedings—is attended with many conveniences and advantages over any other mode, as it establishes as matter of record, importing verity against the grantee, the facts upon which the forfeiture depends and thus avoids uncertainty in titles and consequent litigation. But that mode is not essential to the divestiture of the interest where the grant is for the accomplishment of an object in which the public is concerned and is made by a law which expressly provides for the forfeiture when that object is not accomplished. *Where lands and franchises are thus held, any public assertion by legislative act of the ownership of the State, after default of the grantee, such as an act resuming control of them and appropriating them to particular uses, or grant-*

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ing them to others to carry out the original object, will be equally effectual and operative. [The court citing *United States v. Repentigny* and *Schulenberg v. Harriman*].

In *Bybee v. Oregon and California Railroad Co.* (139 U. S. 663) the grant involved in the case at bar was considered. The court said:

And in all cases in which the question has been passed upon by this court, the failure to complete the road within the time limited is treated as a condition subsequent, not operating *ipso facto* as a revocation of the grant, but as authorizing the Government itself to take advantage of it, and forfeit the grant *by judicial proceedings, or by an act of Congress, resuming title to the lands.*

Iron Mountain R. R. Co. v. Memphis, 96 Fed. 113, decided in 1899, was a suit in equity to enjoin the City of Memphis and its legislative council from enforcing a forfeiture.

We take the following from the opinion of Judge Taft:

Where the sovereign makes a grant upon condition subsequent, the breach of the condition does not, of itself, divest title and right of possession, but the power is in the sovereign, as grantor, *to manifest his will that the condition*

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shall be enforced, and this manifestation of his will is by *legislative action*. In this case the condition expressly requires that the council shall exercise an option before forfeiture should ensue. In exercising such an option the council is acting in a legislative capacity. Its declaration is a law.

Columbia Valley R. Co. v. Portland, etc. (162 Fed. 603). Decided in 1908. By act of March 3, 1875 (18 Stat. 482), Congress granted the right of way through the public lands to railroad companies upon certain terms and conditions, and among others, that the railroad should be constructed within five years from the time of the appropriation of the right of way by the filing of map of survey in the office of the Secretary of the Interior. By act of June 26, 1906 (34 Stat. 482), Congress declared forfeited to the United States all grants of right of way and station grounds under the act just mentioned, in cases where the railroad company had failed to construct its railroad within the time required. The question before the court was whether this was a proper exercise of the right of forfeiture on behalf of the United States. The opinion was written by Judge Gilbert, who said (page 606):

The question arises whether this act operated *ipso facto* to forfeit the right of the appellant to any section of its located road not com-

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pleted within five years from the date of the location. The appellant denies that it has that effect, and contends that, *in addition to the act, there must be a judicial ascertainment of forfeiture by a procedure in the nature of an inquest of office*, citing *Fairfax v. Hunter* (7 Cranch, 603, 3 L. ed. 453), *Smith v. Maryland* (6 Cranch, 286, 6 L. ed. 225), and *United States v. Repentigny* (5 Wall. 211, 18 L. ed. 626); and argues that while an act of Congress declaring forfeiture unconditionally may be sufficient where no facts are to be ascertained, the forfeiture here, under the act of June 26, 1906, which is to be enforced only where the road has not been constructed within the five years following the location, or where the construction of the railroad was not progressing in good faith at the date of the approval of the act, leaves two important questions to be decided before the forfeiture is to take effect. But these questions so suggested are questions of fact of the nature of those which are to be determined in any case where the inquiry is whether particular rights under a grant have been forfeited under the provisions of a forfeiture act. *The act itself takes the place of the adjudication of forfeiture and of the inquest of office.* It is the “legislative assertion of ownership of the prop-

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erty for breach of condition.” *It is itself the entry of the grantor for condition broken.*

Judge Gilbert then discussed the leading authorities upon this subject, including all of those hereinbefore referred to. The opinion in this case is very instructive upon this general question, and supports the contention of the Government in the case at bar.

(See also: *Cooke v. United States*, 91 U. S. 396; *United States v. DeVisser*, 10 Fed. 642, 647; *United States v. Campbell*, 10 Fed. 816, 821; *Cotton v. United States*, 11 How. 228, 231; *Smith v. Maryland*, 6 Cranch 286; *McMicken v. United States*, 97 U. S. 204, 217; *Van Wyck v. Knevals*, 106 U. S. 360, 368; *St. Louis, etc., R. Co. v. McGee*, 115 U. S. 469, 473; *United States v. California, etc., Land Co.*, 148 U. S. 31; *Schlesinger v. Railway Company*, 152 U. S. 444, 453; *United States v. O. & C. R. R. Co.*, 164 U. S. 526; *Atlantic & Pacific v. Mingus*, 165 U. S. 413, 431, 434; *New York Indians v. United States*, 170 U. S. 1, 24; *United States v. Tennessee, etc., R. Co.*, 176 U. S. 242, 256; *United States v. Northern Pacific*, 177 U. S. 435, 441.)

(h) *Trial by jury not required.*

The contention by defendants that the Government can assert a right of forfeiture only through the finding of a jury made before the institution of suit, is based upon the assumption that the pro-

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ceeding "inquest of office" is applicable to the United States. They say that inquest of office involved a jury trial and that the constitution of the United States preserves for them the right to such a trial in a case of this character. The trouble with this argument is that the proceeding inquest of office, as we have shown, does not apply to the United States and even if it did, it was but a special proceeding and not within the purview of the constitutional provision preserving due process of law. Besides, during the last 120 years the United States has brought many actions to forfeit grants for breaches of conditions and not in a single instance was inquest of office resorted to or considered necessary.

..

Due process of law carries with it the right of trial by jury when trial by jury has been the usual course of administration in the particular class of cases through courts of justice to which the one in question belongs. That term carries with it the right of trial by jury in all cases in which trial by jury was a part of the usual course of administration through courts of justice at the time the constitution was adopted.

Hurtado v. California, 110 U. S. 535; Light v. Canadian County Bank, 2 Okla. 551.

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(i) *Congress authorized forfeiture.*

Congress has not declared a forfeiture in the case at bar, but it has authorized and directed the Attorney-General to do so. It said in the act, authorizing him to bring this action, that he was “authorized and directed to institute and prosecute any and all suits in equity, actions at law, and other proceedings which he may deem adequate and appropriate to enforce any and all rights and remedies of the United States of America in any manner arising or growing out of or pertaining to” the acts in question granting lands, etc., “and in and by any and all such suits, actions, or proceedings, * * * in such manner as he shall deem appropriate, assert all rights and remedies existing in favor of the United States relating to the subject of such suits, actions, and proceedings, including the claim on behalf of the United States that the lands granted by each of said acts, respectively, or any part thereof, have been and are forfeited to the United States by reason of any breaches or violations of any of the terms or conditions of either or any of said acts which may be alleged and established in any such suits, actions, or proceedings; it not being intended hereby to determine the right of the United States to any such forfeiture or forfeitures, but it being *intended to fully authorize* the Attorney-General in any by such suits, actions, or proceedings to assert on behalf of the United States and the court or courts before which such suits, actions, or proceed-

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ings may be instituted or pending to entertain, consider, and adjudicate the claim and right of the United States to *such forfeiture* or forfeitures, and *if found to enforce* the same.”

The bringing of the pending suit, in pursuance of that authorization, is the equivalent of a declaration by Congress itself of a forfeiture.

In *Ruch v. Rock Island*, 97 U. S. 693, 697, it was said:

Bringing suit for the premises by the proper party is sufficient to authorize a recovery, without actual entry or a previous demand of possession.

In *Union Pacific v. Cook*, 98 Fed. 281, 284, Judge Thayer, speaking for the Circuit Court of Appeals, said:

The commencement of a suit in ejectment by the grantor takes the place of a formal entry and demand of possession.

The foregoing authorities amply sustain the proposition that the institution of legal proceedings authorized by Congress is a sufficient exercise of an election to claim a forfeiture.

Second. The fact that the practical relief prayed for is to enforce a forfeiture is not a ground for equity to refuse to exercise its jurisdiction.

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(a) *Exceptions to the general rule.*

The general rule that equity will refuse to enforce forfeitures is not absolute. It will enforce them where the plaintiff is without an adequate remedy at law.

In *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801, Judge Van Devanter, speaking for the court, discussed this question as follows:

Both because forfeitures are *usually* harsh and oppressive, and because they can *ordinarily* be enforced at law, courts of equity *generally* refuse to aid in their enforcement (Citing many federal decisions). This has been at times declared to be an absolute and inflexible rule, as in *Marshall v. Vicksburg* (15 Wall. 146) where it is said: "Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either." And at other times it has been stated with some qualification, as in *Henderson v. Carbondale Coal & Coke Co.* (140 U. S. 25), where it is said: "Equity always leans against them, and only decrees in their favor when there is full, clear, and strict proof of a legal right thereto." *The better view is that the rule is not absolute or inflexible, any more than is every forfeiture harsh and oppressive; that its influence and operation do not extend beyond the reasons which underlie it; and that in cases, otherwise properly cog-*

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nizable in equity there is no insuperable objection to the enforcement of a forfeiture when that is more consonant with the principles of right, justice, and morality than to withhold equitable relief. As said by Story (Eq. Jur. Sec. 439): “The beautiful character of pervading excellence, if one may so say, of equity jurisprudence, is that it varies its adjustments and proportions so as to meet the very form and pressure of each particular case in all its complex habitudes.” In *Brown v. Vandergrift* (80 Pa. 142, 148), a case involving the forfeiture of an oil lease, it was held by the Supreme Court of Pennsylvania: “In a case like this equity follows the law, and will enforce the covenant of forfeiture, as essential to do justice. It is true as a general statement that equity abhors a forfeiture; but this is when it works a loss that is contrary to equity, not when it works equity and protects the land owner against the indifference and laches of the lessee and prevents a great mischief.” *Glocke v. Glocke*, 113 Wis. 303.

Memphis, etc., R. R. Co. v. Neighbors (51 Miss. 412) is not an exception to this rule. In that case the defendants were in actual possession and consequently the plaintiff had an adequate remedy at law.

In *Vicksburg, etc., R. R. Co. v. Ragsdale* (54

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Miss. 200, 208), it was held that if the plaintiff be without adequate remedy at law, equity will entertain a suit to quiet a title, even though it depend on a forfeiture.

In *Lafayette County v. Hall* (70 Miss 678), it was held that the general rule against the enforcement of forfeitures in equity is not applicable when the right of forfeiture is based upon a statute.

(b) *The general rule is not applicable to forfeitures asserted by the Government.*

The general reason underlying the doctrine that equity will not aid in the enforcement of forfeiture is that forfeitures are usually harsh and oppressive. From the nature of things, the rule cannot be applicable to acts of the Government, in the discharge of governmental functions, for the conservation of the general public welfare. The Government never inserts conditions in its grant for the purpose of pecuniary gain, or for the purpose of obtaining an unconscionable advantage over those dealing with it.

(c) *The rule in England.*

One of the chief functions of the chancery and the exchequer was to ascertain and enforce all property rights of the King, including those accruing by forfeiture and escheats. This we have already shown in our discussion under the head of inquest of office. Equity lent its writs for the express pur-

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pose of doing that without which a forfeiture in favor of the King was impossible. [Ante. p. 248 *et seq.*].

(d) *Rule in the United States upon the subject.*

In *Farnsworth v. Minnesota* (92 U. S. 49) we read:

It is said that provisions for forfeiture are regarded with disfavor and construed with strictness and that courts of equity will lean against their enforcement. This, as a general rule, is true when applied to cases of contract, and the forfeiture relates to a matter admitting of compensation or restoration; but there can be no leaning of the court against a forfeiture which is intended to secure the construction of a work, in which the public is interested, where compensation cannot be made for the default of the party, nor where the forfeiture is imposed by positive law. "Where any penalty or forfeiture," says Mr. Justice Story, "is imposed by statute upon the doing or omission of a certain act, there courts of equity will not interfere to mitigate the penalty or forfeiture, if incurred; for it would be in contravention of the direct expression of the legislative will" (Story's Eq. Jur., sec. 1326). The same doctrine is asserted in the case of *Peachy v. The Duke of Somerset*, reported in the 1st Strange, and in that of *Keating v. Sparrow*, reported in

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1st Ball & Beatty. In the first case Lord Macclesfield said that “cases of agreement and conditions of the party and of the laws are certainly to be distinguished. You can never say that the law has determined hardly; but you may that the party has made a hard bargain.” In the second case, Lord Manners, referring to this language and taking the principle from it, said that “it is manifest that in cases of mere contract between parties this court will relieve when compensation can be given; but against the provisions of a statute no relief can be given.

The court further held that where a forfeiture is sought to be enforced to enable the Government to discharge some important function, not only does the general rule against the enforcement of forfeitures not apply, but in such case a court of equity will lend its jurisdiction upon grounds of public policy.

The conditions in the grant under examination were inserted to conserve an important public policy, namely, to prevent land monopolies and to promote a distribution of the public lands in a manner consistent with the permanent industrial welfare of the nation.

(e) *The general doctrine that equity will not entertain a suit to enforce a forfeiture is not ap-*

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plicable when the right of forfeiture is based upon a statute, as distinguished from a private contract.

If the United States is entitled to a forfeiture in the suit at bar, it is not by virtue of a transaction analogous to a contract between private parties, but is based upon a positive law enacted by Congress.

In *Lafayette County v. Hall*, 70 Miss. 678, the court said :

Equally untenable is the position assumed by counsel for appellees that equity will refuse its aid in the enforcement of penalties. The unsoundness of this view lies in the failure to mark the distinction between statutory penalties and penalties created by contract between private persons. The latter, courts of equity refuse to enforce; but the former, the expression of the will of the law-making power, the *courts of equity will not undertake to disregard and nullify by refusing their aid in proper cases.*

To the same effect see: (Pomeroy's Equity Jurisprudence, vol. 1, sec. 458; Story's Equity Jurisprudence, sec. 1326; *Clark v. Barnard*, 108 U. S. 436; *Powell v. Redfield*, 4 Blachf. 45; *Fed. Case No. 11359*; *Chapman v. Oregon*, 5 Oreg. 432, 436.)

Third. This suit is maintainable (a) as a suit to quiet title, and (b) as

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a suit to determine adverse claim to real property under Section 516 of the Annotated Codes of Oregon.

The United States is entitled to enforce its rights of property and other contract rights by all of the methods that are available to private individuals.

In *Cotton v. United States*, 11 How. 228, the court said:

Although, as a sovereign, the United States may not be sued, yet, as a corporation or body politic, they may bring suits to enforce their contracts and protect their property, in the state courts, or in their own tribunals administering the same laws.

(a) *This suit should be entertained as a suit to quiet title under the general doctrines of equity jurisprudence.*

To quiet a title, or remove a cloud therefrom, has always been one of the leading heads of equity jurisprudence. There is but one general limitation upon the right to maintain a suit to quiet title, and that is the general limitation applicable to all suits in equity, namely, plaintiff must be without an adequate remedy at law. This rule is sometimes carelessly stated to the effect that a suit to quiet title can only be maintained where the plaintiff has both legal title and possession. This is not correct. If he holds both under circumstances which would prevent him from having an adequate remedy at law, equity will give relief. (32 Cyc. p. 1337.)

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(b) *Possession by plaintiff not necessary when lands are vacant and unimproved.*

If the lands be vacant and unimproved, as they are here, ejectment will not lie, and no other common law remedy is available. In such a case there is not only an inadequacy, but a total lack of remedy at law.

In *Christy v. Springs*, 11 Okla. 710, the court said:

However, independent of the statute, an action to quiet title may be maintained by the holder of the legal title where he is not in possession, if the premises are vacant and unoccupied.

In *Douglas v. Nuzum*, 16 Kas. 515, Judge Brewer, speaking for the court, declared that under the general principles of equity jurisprudence, independent of a statute, a suit to quiet title may be maintained even though the plaintiff is not in possession, if the premises are vacant and unoccupied.

In *Davenport v. Stephens*, 95 Wis. 456, the Court said:

Some question was raised whether the plaintiff has shown such possession as should entitle her to maintain this action. It is entirely immaterial whether she was in the actual possession or not. No other person was in the actual

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possession. (Grand Rapids, etc. v. Sparrow, 36 Fed. 210; Southern Pacific v. Goodrich, 57 Fed. 879; Taylor v. Clark, 89 Fed. 7; Holland v. Challen, 110 U. S. 15; O'Brien v. Crietz, 10 Kas. 202; Uteley v. Fee, 33 Kas. 683; Hoffman v. Woods, 40 Kas. 382.)

(c) *Question of possession is immaterial when the common law remedies are inadequate.*

The common law remedy of ejectment is not always adequate. Therefore, even in cases where the defendants are in possession, equity will entertain a suit to quiet title, if under the circumstances of the case the common law remedies are inadequate.

In O'Hara v. Parker, 27 Oreg. 156, 170, it was expressly held that a party out of possession may maintain a suit to quiet title to vacant lands, under the general principles of equity jurisprudence, when for any reason the remedies at law are inadequate. This case contains also a valuable discussion of the distinction between actual and constructive possession in cases of this character.

(A. & E. Ency. of Pl. & Pr., vol. 17, page 311; Bunce et al. v. Gallagher et al., 5 Blatchf. 481; Sayers et al. v. Burkhardt et al., 85 Fed. 246; Smith v. Zimmerman, 85 Wis. 542; Kruczinski v. Neuendorf et al., 99 Wis. 264; Nixon v. Walter, 41 N. J. Eq. 103; Beedle v. Mead, 81 Mo. 297; Hamilton et al. v.

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Batlin et al., 8 Minn. 403; King v. Carpenter, 37 Mich. 363; Jackson v. Cooper et al., 10 Tenn. 524.)

The suit at bar comes within the foregoing principles. Even if the defendants were in the actual possession of the lands, an action in ejectment would be inadequate to grant the relief claimed. This must be clear. A court of law would be unable to prevent defendants from mortgaging or conveying the land pending the suit. It could not adjudicate the rights of the Union Trust Company and Stephen T. Gage, or the rights of the cross-complainants or interveners. When equity is properly invoked on any ground, jurisdiction will be retained to adjudicate and enforce all the rights of the parties to the suit. (Ober v. Gallagher, 93 U. S. 199; Gormley v. Clark, 134 U. S. 338; Sunflower Oil Co. v. Wilson, 142 U. S. 313; Hopkins v. Grimshaw, 165 U. S. 342; Sill v. Solberg, 6 Fed. 468; Hayden v. Snow, 14 Fed. 70; Pacific R. R. v. Atlantic & Pacific, 20 Fed. 277; North British, etc., v. Lathrop, 63 Fed. 508.)

(d) *This suit should be entertained as a suit to determine adverse claims to real property under the provisions of section 516 of the Annotated Codes of the State of Oregon, which reads:*

Any person claiming an interest or estate in real estate, not in the actual possession of another, may maintain a suit in equity against

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another who claims an interest or estate therein adverse to him, for the purpose of determining such conflicting or adverse claims, interests or estates.

In *Wehrman v. Conklin*, 155 U. S. 314, the court, speaking of statutes of this class, said:

This method of adjusting titles by bill in equity proved so convenient that in many of the States statutes have been passed extending the jurisdiction of a court of equity to all cases where a party in possession, and sometimes out of possession, seeks to clear up his title and remove any cloud caused by an outstanding deed or lien which he claims to be invalid, and the existence of which is a threat against his peaceable occupation of the land, and an obstacle to its sale. The inability of a court of law to afford relief was a strong argument in favor of extending the jurisdiction of a court of equity to this class of cases.

In *More v. Steinbach*, 127 U. S. 70, the bill of complaint contained no allegation of possession by the plaintiff. Objection was urged upon this ground. In speaking to the point the court said:

As to the want of any allegation in the complaint of possession by the plaintiffs, or any evidence of that fact in the proofs, it is sufficient

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to say that by Section 738 of the Code of Civil Procedure of California, a plaintiff asserting title to lands, though out of possession, may maintain an action to determine an adverse claim, estate, or interest in the premises. *People v. Center* (66 Cal. 551). A statute of Nebraska, authorizing a similar suit by a plaintiff out of possession, was before this court for consideration in *Holland v. Challen* (110 U. S. 15), and the jurisdiction of a court of equity to grant the relief prayed in such case was sustained. (Citing several Supreme Court decisions.)

The following authorities hold unqualifiedly that statutes like that of Oregon may be taken advantage of by suits in equity instituted in Federal Courts. *Holland v. Challen*, 110 U. S., 15; *Reynolds v. Crawfordsville Bank*, 112 U. S., 405; *Gormley v. Clark*, 134 U. S., 338; *Whitehead v. Shattuck*, 138 U. S., 146; *Wehrman v. Conklin*, 155 U. S., 314, 323; *Bardon v. Improvement Co.*, 157 U. S., 327.

(e) *What is actual possession?*

In *O'Hara v. Parker*, 27 Oreg., 156, the court, after defining constructive possession, said:

This is possession in law which follows in the wake of title, and is distinguished from actual possession,—*pedis possessio*,—which means a foothold upon land accompanied with the real and effectual enjoyment of the estate,

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with the reception of its fruits, its rents, issues, and profits, and is usually evidenced by occupation, by a substantial enclosure, by cultivation, or by appropriate use according to the particular locality and quality of the property.

To the same general effect see *Hoffman v. Woods* (40 Kas., 382).

Will it be contended that the defendants are in actual possession of the 2,300,000 acres of wild, unimproved lands involved in the case at bar, within the definition of actual possession by the Supreme Court of Oregon?

(f) *Other grounds for maintaining this suit.*

This is not a suit simply to quiet title, with an alternate prayer for enforcement of the provisions of the grants relating to the sales of the granted lands. Equity jurisprudence is invoked upon other grounds.

(g) *As a suit for injunction to prevent waste.*

It is charged in the bill of complaint that the railroad company has heretofore cut large quantities of timber growing upon the lands and has otherwise committed waste thereupon, and that it will continue to commit waste in the particulars mentioned, as well as in other respects, unless restrained. The evidence supports this allegation,

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(Ante. p. 89) and the court so found (Ante. p. 106). This presents a ground for equitable cognizance.

Thus, it has been held that the removal of ore from public lands will be restrained by injunction. *United States v. Gear*, 3 How., 120, 133; *United States v. Parrott*, Fed. Case, 15998.

And it has been held that the United States may invoke the jurisdiction of equity to restrain the cutting of timber upon the public lands of the United States. See *Cotton v. United States*, 11 How., 228, 232; *United States v. Livestock Co.*, 76 Fed., 694; *United States v. Guglard*, 79 Fed., 21, 23.

(h) *To avoid a multiplicity of suits.*

In addition to the remedies of the United States as against the railroad company, it is necessary to secure an adjudication of the rights of the United States as against the defendant Stephen T. Gage, as surviving trustee of the trust deed of June 2, 1881; also as against the Union Trust Company, as trustee under the mortgage of July 1, 1887; also as against each of the sixty-six parties who had instituted suits against the defendants, which were pending at the time the suit at bar was instituted, and in each of which an equitable title to certain of the lands involved in the suit at bar was asserted by matter of record in the trial court. *Hale v. Allinson*, (188 U. S., 56); *DeForest et al. v. Thompson et al.*, (40 Fed., 375); *Preteca et al. v. Maxwell*

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Land Grant Co., (50 Fed., 674); Pennefeather et al. v. Baltimore etc., (58 Fed., 481); New York Life Ins. Co. v. Beard et al., (80 Fed., 66); Bailey v. Tillinghast, (99 Fed., 801); Boyd et al. v. Schneider et al., (131 Fed., 223.)

The doctrine that equity will lend its jurisdiction to render speedy and complete justice, and avoid the vexations and irreparable injuries resulting from a multiplicity of actions and suits, is peculiarly applicable to the circumstances of the suit at bar.

Even if the suit at bar was not originally cognizable in equity, the consolidation of it with the suits of the cross-complainants brought it within the jurisdiction of equity.

An objection to the jurisdiction of a court of equity may be waived by the defendants. If waived, the court will proceed to adjudicate the rights of the parties.

In *O'Hara v. Parker* (27 Oreg., 156, 173) it was expressly held that objection to the jurisdiction of equity to entertain a suit to quiet title might be waived, and in that case it was held to have been waived because the defendant failed to interpose a plea challenging the right of the plaintiff to proceed in equity, but, on the contrary, interposed an answer in which the defendant asked for affirmative relief. To the same effect see the decision in *State v. Blize*

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(37 Oreg., 404, 409); also 32 Cyc., 1338, and cases cited.

It is submitted that when the defendants moved to consolidate the suits of the cross-complainants with the suit of the Government, they necessarily conceded that the suit of the Government was cognizable in equity, and they cannot now urge objections against the jurisdiction of equity to adjudicate the cause.

VI.

WAIVER—EFFECT OF PATENTS—STATUTE OF LIMITATIONS—
LACHES.

Under which will be discussed the arguments advanced by the defendants in support of the following propositions: That all rights under the actual settlers provisions have been waived; that the provisions have been construed by executive officers adverse to the construction now advocated by the government; that the suit is barred by certain acts of Congress; that the binding force of the restrictive provisions was terminated by the issuance of patents and that the suit is barred by laches.

First. There are certain principles of law which should be kept in mind as we examine the alleged grounds of waiver.

(a) *Waiver necessarily implies knowledge of*

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the right and an intention to relinquish it.

There is a distinction between waiver on the one hand and laches and estoppel on the other. Waiver may be applicable to the Government, but laches and estoppel never. Waiver rests upon knowledge of the right and an intention to waive it. Laches rests upon neglect in the enforcement of the right.

In A. & E. Enc. of Law, vol. 29, p. 1091, it is said:

No one can acquiesce in a wrong while ignorant that it has been committed, and that the effect of his action will be to confirm it.

Again,

The burden of proving knowledge is on one who relies on a waiver, and such knowledge must be plainly made to appear. Certainly a presumption of waiver cannot be rested on a presumption that the right alleged to have been waived was known. * * * It has been held that a waiver never occurs unless intended. *Id.* 1093.

In *Pence v. Langdon*, 99 U. S., 578, 581, the court said:

Acquiescence and waiver are always questions of fact. There can be neither without knowledge. The terms import this foundation

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for such action. One cannot waive or acquiesce in a wrong while ignorant that it has been committed.

In *Bennecke v. Insurance Company*, 105 U. S., 355, 359, the court said:

A waiver of a stipulation in an agreement *must, to be effectual, not only be made intentionally, but with knowledge of the circumstances.* This is the rule when there is a direct and precise agreement to waive the stipulation. *A fortiori* is this the rule when there is no agreement either verbal or in writing to waive the stipulation, but *where it is sought to deduce a waiver from the conduct of the party.*

There is no proof in the case at bar that the breaches of the actual settlers provisions were ever brought to the attention of any governmental body or officer having power to waive them. An officer in the Department of the Interior known as Auditor of Railroad Accounts, and afterwards as Railroad Commissioner, received certain reports from the Oregon & California Railroad Company which showed that the company was selling the land at more than \$2.50 per acre, but not in excess of 160 acres to one person. (Ante. p. 98). These reports were transmitted to the President and by him laid before the *lower* house of Congress where they were referred to the proper committee and after-

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wards published as executive documents. This reference was, of course, merely perfunctory. There is nothing to show that Congress ever considered them or ever had any actual knowledge of what they contained. Even if it had such knowledge there is nothing to show an intention on its part to relinquish the right which the government had to have the settlers' provisions obeyed. There was but one way by which that intention, if it existed, could have been manifested; that was by resolution or an act and, of course, there was neither. Knowledge on the part of any other body or any officer of the government would have been ineffectual because, as we shall show in a moment, Congress alone had the power to waive the provision. (Infra. p. 282).

(b) *Mere silent acquiescence in breaches of a condition never constitutes waiver of either the breaches or the condition.*

In A. & E. Enc. of Law, vol. 29, p. 1105, we read :

It may be safely asserted that mere indulgence or silent acquiescence is never construed into a waiver, unless some element of estoppel can be invoked.

Again,

A waiver will not be implied from slight circumstances but must be evidenced by an un-

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equivocal and decisive act, clearly proven. Id. 1105.

In Washburn on Real Property, vol. 2, sec. 962, the rule is stated thus:

A mere silent acquiescence in, or parole assent to, an act which has constituted a breach of an express condition in a deed, would not amount to a waiver.

In Gray v. Blanchard, 8 Pick., 284, the court said:

A mere indulgence is never to be constructed into a waiver of a breach of condition; and so are the authorities.

In Trustees of Union College v. New York, 173 N. Y., 38, we find this language:

The effect of an express condition in a deed cannot be destroyed by silent acquiescence.
* * * The title to the property was vested in the grantee and the plaintiff was entitled to assume that its grantee would comply with the condition of the grant.

In Howe v. Lowell, 171 Mass., 575, it was said:

It is to be noticed that the terms of the deed were equally well known to both parties, and whether the city was violating the condition of the deed was a matter of which the city could

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judge as well as Howe. Howe did nothing actively to induce the city to erect the pumping station. He simply stood by and saw it done without making objection.

Other authorities to the same effect: Jackson v. Cryslar, 1 Johns. Cases, 125; Carbon Block Coal Company v. Murphy, 101 Ind., 115; Tiffany on Real Property, vol. 1, p. 179.

(c) *The mere waiver of breaches of a condition will not constitute a waiver of the condition itself.*

If a party injured by one breach of a contract sees fit to waive the breach he does not thereby license the other party to made additional breaches.

In Tiedeman on Real Property, 3 ed., sec. 208, the rule is thus stated:

If a party, who is entitled to the right of entry, waives the performance by *an actual release of the condition*, or by an *express license*, the condition is gone and he cannot take advantage of any subsequent breach. *But a mere acquiescence, without actual license, would only constitute a waiver of the present breach, and the right of entry for subsequent breaches would survive.*

In Tiffany on Real Property, vol. 1, page 179, the rule is stated thus:

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The waiver operates only on previous breaches, and does not affect the right to take advantage of a subsequent breach; and, accordingly, mere silence or acquiescence in a breach of a condition will not imply a license for a subsequent breach.

In *Ireland v. Nichols* (46 N. Y., 413, 417), the court held that a condition in a lease prohibiting sub-letting is a condition of continuing obligation, and a waiver of one breach does not waive subsequent breaches; nor does it waive the condition itself.

In *Crocker v. Old South Society* (106 Mass., 489, 498), it was held that a waiver of a breach of a condition does not waive the binding force of the condition itself, nor the right to take advantage of subsequent breaches.

The practical application of the rule now being discussed is aptly illustrated by the decision in *Alexander v. Hodges* (41 Mich., 691). In that case there had been flagrant violations of the conditions of a lease by the tenant, and the lessor had exercised unusual indulgence. The tenant afterwards attempted to claim that the acquiescence of the lessor constituted a waiver of the condition itself. The court said (p. 694):

If the conditions were continuous, there is no reason to hold them waived by a receipt of

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rent for any time. The desire of the landlord to avoid coming to extremities if the lessee would mend his ways can not be regarded as a waiver, but was laudable and calculated to further the interests of both. *When there is a continuous obligation, there is nothing to prevent the exercise of forbearance until it ceases to be desirable.*

The rule discussed in the foregoing authorities is applicable in cases where the grantor has full knowledge of the breaches and full knowledge of the right of re-entry, but fails to exercise it. If in such cases there is no presumption of an intention to waive the condition and thus authorize subsequent breaches, there can be none in a case, such as the one at bar, where there is no knowledge of the breach.

(d) *No one but Congress can waive a breach of a condition, or the condition itself, in the case of a congressional grant.*

A grant, as we have seen, is a law—an Act of Congress; no one can change an Act of Congress but Congress itself. It is not in the power of any executive officer of the Government to amend, modify or waive a statutory provision. This should go without saying.

In *Hawkins v. United States*, 96 U. S. 689, 691, it is said:

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Principals * * * are, in many cases, bound by the acts and declarations of their agents, even when the act or declaration was done or made without any authority, if it appear that the act was done or the declaration was made by the agent, in the course of his regular employment; but the Government or public authority is not bound in such a case, unless it manifestly appears that the agent was acting within the scope of his authority, or that he had been held out as having authority to do the act or make the declaration for or on behalf of the public authorities.

It does not “manifestly” appear in this case that any executive officer of the Government had authority to waive the condition we are considering.

In *New York Indians v. United States*, 170 U. S., 1, it was expressly held that the executive officers of the Government had no authority to take advantage of a breach of a condition annexed to a grant made by Congress. To the same effect see: *United States v. Northern Pacific*, 177 U. S. 435.

If they had no authority to take advantage of a breach by the defendants how can it be said that failure to do so worked a waiver—that a failure to do that which they had no power to do waived a valuable right.

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Besides, on October 26, 1880, the Attorney-General advised the Executive Departments of the Government that they could not take advantage of a breach of a condition subsequent in one of the Atlantic and Pacific railroad grants, unless specifically authorized to do so by Congress. His opinion was based largely upon the decision of the Supreme Court in *Schulenberg v. Harriman*, (88 U. S., 44).

Having examined the question with great care he concluded his opinion thus:

I am therefore of opinion that the grant to the railroad has not been forfeited by its failure to complete its road within the time named in the act, no action by reason of its failure to perform the conditions having been taken by authority of Congress (16 Attorney-General's Opinions, 572, 576).

The executive officers acted on this advice. If therefore, they had knowledge of the breaches by the defendants and failed to act with respect to them, it was because they did not believe they had authority to act, and not because they intended to waive the breaches.

Second. Other grounds upon which defendants predicate waiver.

(a) *Acquiescence in the conveyance by the East*

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Side Company to the Oregon & California Railroad Company.

It is clear that the conveyances from the East Side Company to the Oregon & California Railroad Company was intended simply to make the latter company the successor of the former. The transaction was so considered and treated by all parties, including the Government. No patents were ever issued to the East Side Company, but, on the contrary, all have been applied for by, and issued to, the Oregon & California Railroad Company *as the successor of the East Side Company*. (Ante. p. 86). The chain of title runs direct from the Government to the Oregon & California Railroad Company. Moreover, the East Side Company had filed a map of location only as to the first sixty miles of the railroad, at the time it was succeeded by the Oregon & California Railroad Company. All of the other maps were filed by the latter company. That the transaction was not intended as a *sale of lands*, but as a *succession to the general franchise rights* of the older company, is too plain to require argument.

(b) *Construction of act by executive officers.*

It is contended by the defendants that the Commissioner of the General Land Office, the Auditor of Railroad Accounts, afterwards called Railroad Commissioner, and other officials of the Government, many years ago put a construction upon the grants to the effect that the actual settlers provision was inapplicable. This is predicated largely upon

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the claim that the Auditor of Railroad Accounts was required by the act of June 19, 1878, creating his office, to see that the laws with respect to land grant railroads west of the Missouri River were enforced; that he knew the grantee railroad company had repeatedly violated the terms of the actual settlers provision and that he took no steps to enforce the law against it. This they affect to believe amounted to a construction by him of the law and that such construction is binding upon the Government under the rule that

When the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the department charged with its execution, where that construction has for many years, controlled the conduct of the public business. (U. S. v. Healey, 160 U. S., 141).

A ready answer to this contention is that the Auditor of Railroad Accounts was charged with the duty of enforcing the law, not with power to waive its enforcement. Furthermore, the fact that an officer charged with the duty of enforcing a law, fails to perform that duty, cannot be plead as a defense by the law violator when he is called to account for his dereliction. Besides, neither the Auditor of Railroad Accounts, nor any other executive officer of the Government, had the power to en-

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force the actual settlers provision. That, as we have seen, could be done only by Congress declaring a forfeiture, or specifically authorizing some officer to do so. Congress had not done this prior to 1908 and, hence, the Auditor of Railroad Accounts and all other executive officers were without power in the premises.

Moreover, the decisions cited by defendants in no wise warrants the position which they take. They are cases which deal with situations where an executive officer was authorized by Congress to administer a law which is open to more than one construction. In such cases the construction adopted by the officers is given much weight by the courts. In *Webster v. Luther*, (163 U. S., 331, 342), we read:

The practical construction given to an Act of Congress, fairly susceptible of different construction, by one of the executive departments of the Government, is always entitled to the highest respect and in doubtful cases should be followed by the courts, especially when important interests have grown up under the practice adopted, * * * but this court has often said that it will not permit the practice of an executive department to defeat the obvious purpose of a statute.

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The question here, as presented by the defendants, is not whether one meaning or another shall be given to the actual settlers provision, but whether it shall be given an meaning at all—whether it shall not be rejected as so much surplusage.

But there is another consideration in this connection which is most significant. The construction which defendants say was placed upon this act by the executive officers of the Government is at best a strained deduction from *failure* to act. How particularly unsubstantial must such a deduction be in the presence of the fact that the Secretary of the Interior affirmatively construed the actual settlers provision, at the request of Mr. Holladay, President of the grantee railroad company, and held that it was enforceable and meant precisely what it said. This was done, it will be remembered, in 1871 (Ante. p. 66 *et seq.*). That construction has never been changed. It is precisely the same as the construction for which the Government now contends. In addition, the executive officers in 1880 were advised by the Attorney-General that they had no power to declare a forfeiture in the case of violated railroad grants, without the specific authority of Congress. (Ante. p. 284). Whatever the Auditor of Railroad Accounts, or other executive officer, failed to do with respect to the enforcement of the actual settlers provision must be construed in the

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light of these opinions, and when so considered the deduction tortured from the failure must vanish into thin air.

(c) *By the general forfeiture act of September 29, 1890. The first section of this act provided:*

That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to, and coterminous with, the portion of any such railroad not now completed and in operation, for the construction or benefit of which such lands were granted.

The sole purpose of this act was to declare a forfeiture for breach of conditions of the grants requiring construction of the railroad.

The act was general, applying to all grants, and *can not be held to have been intended to apply to conditions peculiar to some of the grants and not common to all.* Moreover, it can not be presumed that Congress had in mind breaches of conditions other than those relating to the construction of the railroad.

Even if the presumption contended for by defendants should be indulged, at the most it could be claimed as a waiver of breaches which occurred

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prior to September 29, 1890. It would not be a waiver of breaches occurring thereafter, and, as the bill of complaint sets forth, nearly all of the substantial breaches in the case at bar occurred after that time.

(d) *The act of January 31, 1885.*

It is also contended by defendants that the forfeiture act of January 31, 1885, relating to the West Side grant, by implication waived the binding force of the condition restricting the manner of selling the granted lands.

This is so unreasonable that discussion is unnecessary.

(e) *Constructive notice ineffectual.*

Waiver, as we have seen, implies actual knowledge; it will never be presumed from constructive knowledge alone.

Besides a party is never held to have constructive knowledge of instruments recorded subsequent to his own title.

In A. & E. Enc. of Law, vol. 24, page 146, it is said:

The operation of the record as notice is prospective and not retrospective. It is only a subsequent conveyance which defeats a prior unrecorded conveyance, and therefore, only

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persons who acquired their rights subsequently to the registration can be said to be charged with notice of a recorded conveyance.

In *Rannels v. Rowe*, 145 Fed., 296, it was held that a party is not bound by constructive knowledge of instruments recorded subsequent to his title.

It is submitted that there is nothing in the case at bar justifying the conclusion that the actual settlers provision was waived.

Third. Do the acts of March 3, 1891, and of March 2, 1896, bar the suit?

The act of March 3, 1891, provides:

That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents.

The act of March 2, 1896, provides:

That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the

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date of the issuance of such patents, and the limitation of section 8 of chapter 561 of the acts of the second session of the 51st Congress, and amendments thereto, is extended accordingly as to the patents herein referred to.

These provisions, by their terms, relate to suits brought to annul patents. This is not a suit of that kind. While the patent may be annulled as the result¹ of it, it is not predicated upon the idea that the patent was improperly issued, but upon the ground that a condition of the grant has been breached. The title was conveyed by the grant, not by the patent. The latter is but evidence of the title. It was manifestly the intention of Congress in passing the above mentioned acts to give the Government six years in the one case, and five in the other, *after* the cause of action had *arisen*, in which to bring suit. In truth the statute of limitations necessarily implies the existence of a cause of action, which is to be barred after the lapse of a certain time. Lands under railroad grants are not subject to disposition until patents have been issued. *St. Paul etc. v. Northern Pacific*, 139 U. S., 1; *Deseret Salt Company v. Tarpey*, 142 U. S., 241. It follows that a breach of the condition subsequent could not take place until after the patent had been issued. This in itself shows the inapplicability of the statutes in question.

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Suppose in this case no breach had taken place until seven or eight years after the patents had been issued, would it be reasonable to say that the cause of action was barred by those statutes—barred before it arose? To give such an effect to the statutes would be to treat them, not as statutes of limitations, but as suits amending the granting acts so as to eliminate the provision imposing the condition subsequent.

In 25 Cyc. 990, we read:

It is a familiar principle that a statute of limitation should not be applied to cases not clearly within its provisions. Even cases within the reason, but not within the words, of a statute are not barred but may be considered as omitted cases which the legislature did not deem proper to limit.

See also: *Kirkman v. Hamilton*, 31 U. S., 20, 23; *Missouri etc. v. Rice*, 84 Fed., 131; *Baker, v. Kelley*, 11 Minn., 480; *Henry v. Mining Co.*, 1 Nev. 619.

If Congress had intended to eliminate the actual settlers provision from the grant, it would have done so openly, and not under the guise of a statute of limitations.

Obviously this is not a suit to annul the patents. If it were it would be useless, because the title to

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these lands would still remain in the defendants. To make this suit effective it must go beyond the patents and deal with the grant, which is the source of defendants' title. It is a suit to annul the grant, not the patent, except as an incident. Therefore, these statutes do not apply.

Fourth. Did the issuance of patents bar the suit?

(a) *What does a patent import?*

All acts of Congress conferring authority upon the Interior Department to issue patents for the public lands prescribed that the patents shall be issued only upon compliance by the claimant with certain requirements. Therefore, before the Interior Department issues a patent for any of the public lands, it is the duty of the Interior Department to ascertain whether the provisions of the law have been complied with so as to entitle the party to a patent. Congress having conferred this authority upon the Department of the Interior, the issuance of a patent by the Interior Department, in the absence of fraud or mistake, is ordinarily conclusive as to the existence of the facts justifying the issuance of the patent. And in this sense, patents are said to be conclusive. But this is the extent of the rule, and the reason for the rule.

Patents issued by the Interior Department never convey any greater estate than that authorized by the law under which they are issued. Patents are

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always to be construed as subordinate to all laws relating to the subject in force at the time. The quality of the estate conveyed by the United States can not be ascertained by reference to the terms of the patent alone; but it must be determined by reference to the laws of Congress upon the subject. To illustrate: Patents issued under the homestead law convey a title which cannot be subjected to the payment of debts contracted prior to the date of the patent. This qualification of the estate is not set forth in the patent itself, and yet the effect of the patent is qualified by this provision of the law.

The decision in *Hough v. Porter* (51 Oreg. 388) (98 Pacific Reporter, 1083), is instructive upon this question. The authorities are there collected and discussed, and the court held that in order to determine the nature or quality of the estate conveyed by a government patent, reference must be had to all acts of Congress in force at the time; and that patentees take title with notice of all of the qualifications annexed to the title by virtue of existing laws.

So, it has been held that patents issued under the homestead or preemption laws are subject to the general laws of the United States granting right of way to railroads, through the public lands, although no reference is made in the patent itself to this qualification. (See *Railroad Company v. Baldwin*, 103 U. S., 426).

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But where Congress makes a grant direct, as in the case of railroad grants, and provides for the issuance of patents after the identity of the lands has been ascertained, and as rapidly as the lands are earned, the patent serves an entirely different function. It does not *create the estate or title*; much less does it *define the terms and conditions of the estate or title*. In such a case, the patent performs two distinct functions, viz:

First. It identifies the land, which was not identified by the grant; and it certifies that the lands have been earned by performance of the conditions of the grant precedent to the issuance of the patent.

Second. It fixes the time when the lands are subject to disposition by the grantee; the lands not being subject to disposition prior to the issuance of patent.

The grants in the case at bar illustrated the function and effect of patents under railroad grants. The granting acts *created* the title or estate, and *constituted the grant*. The terms and conditions of the grant—the nature and quality of the estate or title granted—are determined by the granting acts. If the identity of the lands had been known at the time the granting acts were enacted, and Congress had intended to permit the railroad company to immediately dispose of all the lands, there would have been no necessity for the issuance of patents.

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(b) *Authority of the Interior Department as to the issuance of patents under railroad grants.*

In the issuance of patents under railroad grants, the authority and duty of the Interior Department were limited and specific. The Interior Department had but three questions to determine, viz., (1) whether the railroad was constructed as prescribed by the granting act; (2) whether the lands claimed were of the general character described in the granting act, i. e., that they were odd-numbered sections within the limits of the grant; (3) whether the lands claimed were excluded by any of the exceptions of the grant, i. e., that they had not been theretofore disposed of by the United States, and were not subject to homestead or preemption claim, and were not mineral in character.

This being the extent of the duty of the Interior Department in the premises, it necessarily follows that patents issued pursuant to that duty had no greater effect than that of establishing the existence of the facts which made it the duty of the Interior Department to issue the patents.

In support of the foregoing statement of the general functions and effect of patents issued under railroad grants, see the following authorities: *Wisconsin R. R. Co. v. Price Co.*, 133 U. S., 496, 510; *St. Paul etc. v. Northern Pacific*, 139 U. S.,

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1, 6; *Desert Salt Company v. Tarpey*, 142 U. S., 241, 251.

In support of the general proposition that where lands are granted by act of Congress the patents issued thereunder do not add anything to the quality or nature of the estate of the grantee, see the following authorities: *Ryan v. Carter*, 93 U. S., 78, 82; *Morrow v. Whitney*, 95 U. S., 551, 555; *Whitney v. Morrow*, 112 U. S., 693, 695; *Wright v. Roseberry*, 121 U. S., 488, 499.

It is contended on behalf of the defendants that the issuance of patents by the Interior Department was an adjudication, binding upon the United States, that there had been no breach of any of the conditions annexed to the grant. There is no foundation for this contention, either in principle or authority. The Interior Department had no authority to inquire into the question whether the conditions of the grant had been complied with, except those conditions which were made precedent to the issuance of the patent. To illustrate: Nearly all of the land grant railroads failed to construct railroads within the time prescribed by Congress. Applications were made for patents after the railroad company was in default. The question arose whether the Interior Department was in duty bound to issue patents under such circumstances. It was held by the Attorney-General (16 Attorney-Gen-

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eral's Opinions, 397, 401) that the executive officers of the Government had no authority to refuse to issue patents because of a breach of the conditions annexed to the grant; that the authority to take advantage of a breach of condition rested solely with Congress; and that, until Congress authorized a claim of forfeiture for breach of a condition, the executive officers of the Government must continue to issue patents. And this was expressly held by the Supreme Court in *New York Indians v. United State*, 170 U. S., 1.

In other words, even if the Interior Department had known that the railroad company in the case at bar had violated the conditions of the grant restricting the manner of selling the lands, it would still have been the official duty of the Secretary of the Interior to issue patents, if the railroad company was otherwise entitled to them. This being true, it is absurd to contend that the issuance of patents was an adjudication that there had been no breaches of the conditions of the grants restricting the selling of the granted lands.

(c) *One of the functions of patents under railroad grants was to fix the time when lands were subject to disposition.*

A consideration of the second general function of patents issued under railroad grants, above referred to, is conclusive upon the general question.

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Until patents were issued, none of the lands were subject to sale by the railroad company upon any terms, or in any manner. This was expressly held in *St. Paul etc. v. Northern Pacific*, 139 U. S., 1; and *Deseret Salt Company v. Tarpey*, 142 U. S., 241.

Upon the issuance of patents the lands in question were subject to disposition by the railroad company and not before. It is submitted that the issuance of the patents for the granted lands affected in no manner the binding force of the conditions embraced in the actual settlers provision.

Fifth. It is, in effect, contended that the doctrines of laches and estoppel are applicable to the United States, and bar the institution of the present suit.

Several of the arguments advocated by counsel for defendants, while disclaiming any intention to invoke the doctrines of laches and estoppel, nevertheless, when reduced to their final analysis, amount to that and nothing more. That neither of these doctrines may be invoked as against the Government, is too familiar to require discussion. Reference is made to the following authorities: *A. & E. Enc. of Law*, vol. 29, page 156, and cases cited; *United States v. Kirkpatrick*, 9 Wheat., 720, 735; *United States v. Van Zant*, 11 Wheat., 184; *Dox v. Postmaster-General*, 1 Pet. 318, 325; *Gibbons v. United States*, 8 Wall. 269, 275; *Gibson v. Chouteau*, 13 Wall., 92, 94; *Hart v. United States*, 95

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U. S., 316; *Gaussen v. United States*, 97 U. S., 584; *United States v. Dalles Military Road Co.*, 140 U. S., 599, 632; *United States v. Beebe*, 180 U. S., 343, 354; *United States v. Michigan*, 190 U. S., 379, 405; *State v. Portland General Electric*, 95 Pac., 722.

Attention is directed particularly to the decision of the Supreme Court in *United States v. Dalles Military Road Company*, 140 U. S., 599, 632, where it was held that a resolution of Congress, directing the institution of judicial proceedings, is conclusive that there has been no laches on the part of the Government. The court said (page 632):

An assertion that the claim of the United States is a stale claim is an assertion that Congress deliberately directed suit to be brought upon a stale claim. If laches be a good defense, it must be declared that Congress directed suits which would be defeated by showing prior delays by Congress. Besides, the defenses of stale claim and laches can not be set up against the Government.

The foregoing doctrine is applicable to the case at bar. And the same principle applies also to the claim of waiver. How ridiculous it would be for the court to hold that Congress had deliberately directed the institution of the present suit, and the assertion of the right of forfeiture on behalf of the United States, when Congress had, by its own conduct,

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waived the enforcement of this right of forfeiture, and had been guilty of laches in respect thereto.

VII.

RIGHTS OF THE UNION TRUST COMPANY AND STEPHEN
T. GAGE.

The terms of the grants were matters of public record. The repeated sales of the lands in violation of those terms were also matters of public record. When the deeds of trust represented by Stephen T. Gage and Union Trust Company were issued, the grantees therein were charged with knowledge of the terms of the grant and the violations thereof, consequently their titles came to them afflicted with the same infirmities as those possessed by the title of their grantor, the Oregon & California Railroad Company. And their rights must now stand or fall in accordance with the outcome of the suit with respect to that title.

Moreover, it will be remembered that Mr. Gage holds his deed as security for the preferred stock of the Oregon and California Railroad Company. This stock, as well as all the common stock of that company is owned by the Southern Pacific Company. For upwards of twenty years the latter company has been the master of the Oregon and California Railroad Company; has directed all its acts, whether good or bad; has, in truth, been and is the Oregon

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and California Company. Therefore, it would be unreasonable to hold that the Oregon and California Railroad Company had forfeited all its title to those lands, but that the Southern Pacific Company could enforce, through the trustee, Mr. Gage, its claim against them. To do so would be to sacrifice substance to form, to follow the letter which kills, and reject the spirit which quickens.

Moreover, the evidence shows without contradiction that the property, outside of the granted lands, covered by the Union Trust Company's mortgage, is worth upwards of \$30,000,000 (*Ante*, p. 97). The balance due on the mortgage is less than \$17,745,000.00, so that if under some possible view the Trust Company's mortgages should be held valid, the company would be compelled under the rule of marshaling assets to exhaust the property which is not claimed by the Government before having recourse to that which is. (*Matthews v. Memphis, etc., Railroad Company*, 108 U. S. 756, 757.)

CONCLUSION.

The terms of the actual settlers provisions of the acts of 1869 and 1870 are as plain as language could make them. There cannot be and never could have been any just reason for misunderstanding them. More than forty years ago the Oregon and California Railroad Company sought and obtained from the Secretary of the Interior an interpretation of those provisions which is in complete harmony with the interpretation now urged by the Government. From that interpretation no officer of the Government has ever deviated. Notwithstanding this, the defendant Railroad Company flagrantly violated those provisions and now seem to think it harsh that the consequences of its misconduct should be visited upon it. There is not a single equity in its favor; for every dollar in taxes paid it has received more than \$3.00 out of the lands; for every dollar in value given to the Government in the form of free transportation it has received about \$6.00 from the proceeds of the lands (*Ante*, p. 89); for upwards of a quarter of a century it has, for its own selfish purposes and in contempt of the laws of the country, withheld these lands from home seekers, has thwarted the industrial development of a large section of a great state and now demands the right to continue in its vicious work of obstruction and

CONCLUSION.

law defiance. Unless it be reprehensible for the Government to enforce its laws—and there are some who seem to think it is—there is no room for the claim that its action in demanding a forfeiture of the lands in question is inequitable and should be condemned. The decree of the lower court is right and we ask that it be affirmed.

JAMES C. McREYNOLDS,
Attorney-General.

CLARENCE L. REAMES,
United States Attorney for Oregon.

Constantine J. Smyth,

Fred C. Rabb,

Special Assistants to the Attorney-General.

APPENDIX A.

Acts providing for sale of lands at public auction and the dates thereof:

- 1 Stat., 464, May 18, 1796.
- 2 Stat., 229, March 3, 1803.
- 2 Stat., 277, March 26, 1804.
- 2 Stat., 448, March 3, 1807.

Acts providing for the protection of actual settlers and the dates thereof:

- 1 Stat., 257, April 21, 1792.
- 1 Stat., 442, March 3, 1795.
- 2 Stat., 229, March 3, 1803.
- 2 Stat., 455, January 19, 1808.
- 4 Stat., 420, May 29, 1830.
- 4 Stat., 603, July 14, 1832.
- 4 Stat., 663, March 2, 1833.
- 4 Stat., 678, June 19, 1834.
- 4 Stat., 743, June 30, 1834.
- 5 Stat., 251, June 22, 1838.
- 5 Stat., 382, June 1, 1840.

Other acts for the benefits of settlers and the dates thereof:

- 5 Stat., 453, September 4, 1841.
- 10 Stat., 574, August 4, 1854.
- 12 Stat., 392, May 20, 1862.

APPENDIX A.

Acts making grants to aid in the construction of canals and the dates thereof:

- 4 Stat., 236, March 2, 1827.
- 4 Stat., 234, March 2, 1827.
- 4 Stat., 305, May 24, 1828.
- 5 Stat., 245, June 18, 1838.
- 10 Stat., 35, August 26, 1852.
- 13 Stat., 519, March 3, 1865.
- 14 Stat., 30, April 10, 1866.
- 14 Stat., 80, July 3, 1866.

Acts making grants to aid in river improvements and the dates thereof.

- 4 Stat., 290, May 23, 1828.
- 9 Stat., 83, August 8, 1846.
- 9 Stat., 77, August 8, 1846.

Acts making grants to aid in the construction of wagon roads and the dates thereof:

- 3 Stat., 727, February 28, 1823.
- 4 Stat., 234, March 2, 1827.
- 4 Stat., 242, March 3, 1827.
- 12 Stat., 797, March 3, 1863.
- 13 Stat., 140, June 20, 1864.
- 13 Stat., 183, June 25, 1864.
- 13 Stat., 355, July 2, 1864.
- 14 Stat., 86, July 4, 1866.
- 14 Stat., 89, July 5, 1866.

APPENDIX A.

14 Stat., 409, February 25, 1867.

15 Stat., 340, March 3, 1869.

Acts making grants in favor of railroads and the dates thereof:

9 Stat., 466, September 20, 1850.

10 Stat., 8, June 10, 1852.

10 Stat., 155, February 9, 1853.

10 Stat., 302, June 29, 1854.

11 Stat., 9, May 15, 1856.

11 Stat., 15, May 17, 1856.

11 Stat., 17, June 3, 1856.

11 Stat., 18, June 3, 1856.

11 Stat., 20, June 3, 1856.

11 Stat., 21, June 3, 1856.

11 Stat., 30, August 11, 1856.

11 Stat., 195, March 3, 1857.

12 Stat., 489, July 1, 1862.

12 Stat., 772, March 3, 1863.

13 Stat., 64, May 5, 1864.

13 Stat., 66, May 5, 1864.

13 Stat., 72, May 12, 1864.

13 Stat., 365, July 2, 1864.

14 Stat., 83, July 4, 1866.

14 Stat., 87, July 4, 1866.

14 Stat., 94, July 13, 1866.

14 Stat., 210, July 23, 1866.

14 Stat., 236, July 25, 1866.

14 Stat., 239, July 25, 1866.

APPENDIX A.

14 Stat., 292, July 27, 1866.

14 Stat., 548, March 2, 1867.

16 Stat., 94, May 4, 1870.

16 Stat., 573, March 3, 1871.

APPENDIX B.

General forfeiture acts referred to on page —:

- 16 Stat., 277, July 14, 1870.
- 18 Stat., 29, April 15, 1874.
- 18 Stat., 72, June 15, 1874.
- 19 Stat., 101, July 24, 1876.
- 19 Stat., 404, March 3, 1877.
- 23 Stat., 61, June 28, 1884.
- 23 Stat., 296, January 31, 1885.
- 23 Stat., 337, February 28, 1885.
- 24 Stat., 123, July 6, 1886.
- 24 Stat., 140, July 10, 1886.

APPENDIX C.

Authorities as to words necessary to constitute a condition subsequent without words of re-entry or forfeiture:

Marston v. Marston, 47 Me. 495; Chapman v. Pingree, 67 Me. 198; Rawson v. Uxbridge, 7 Allen 125; Gray v. Blanchard, 8 Pick. 284, 287; Hayden v. Stoughton, 5 Pick. 528; Tilden v. Tilden, 13 Gray 103; Langley v. Chapin, 134 Mass. 82; Howe v. Lowell, 171 Mass. 575; Clapp v. Wilder, 176 Mass. 332, 335; Brown v. Caldwell, 23 W. Va., 187, 190; Countryman v. Deck, 13 Abbott's New Cases, N. Y., 110; Trustees of Union College v. New York, 173 N. Y. 38; Hammond v. R. R. Co., 15 S. C. 10, 32; Woodruff v. Trenton Water Power Co., 10 N. J. Eq. 489; Downer v. Downer, 9 Watts 60; Hoyt v. Ketcham, 54 Conn. 60; Pierce v. Brown University, 21 R. I. 392; Blanchard v. Detroit, etc., R. Co., 31 Mich 43, 50; Warvelle on Vendors, 2 Ed., Vol. 1, Sec. 445; Brewster on Conveyances, Ccc. 177.

APPENDIX D.

WITNESSES FOR DEFENDANTS.

Legend.

- “A” Name of witness called, his occupation and page of record where his testimony appears.
“B” County wherein land testified about is located.
“C” Area within county covered by testimony of witness.
“D” Condition of land in natural state.
“E” Percentage of lands suitable for tillage after they have been cleared.
“F” Granted lands in present condition suitable for settlement in tracts of a quarter section.

Symbols.

Employees—Employees of Southern Pacific Company or Oregon and California Railroad Company.

Ex-Employees—Former employees of Southern Pacific Company or Oregon and California Railroad Company.

A—Agricultural lands, suitable for tillage.

G.—Grazing lands.

N. G.—Worthless land.

°—Part.

?—Uncertain.

"A"	"B"	"C"	"D"	"E"	"F"
EMPLOYEES. L. D. McLeod Timber Cruiser (R. VI-2832)	Clackamas Marion Polk Lane Douglas Coos Curry Josephine Jackson Columbia Yamhill Lane Douglas Part of all	? ? ? ? ? ? ? ? ? ? 2 Twp. 1 Twp. 1 Twp. 7 Twp. ?			None None None None None None None None 5% 5% 5% 5%
Alick Wilkinson Timber Cruiser (R. VI-3897)			Timber A. 5% Timber A. 5% Timber A. 5% Timber A. 5% Ex. 353		
A. W. Reese Timber Cruiser (R. VI-2825)	.				

"A"	"B"	"C"	"D"	"E"	"F"
S. C. Bruce Timber Cruiser (R. VI-2825)	Ex. 343				Doubtful as to grazing lands
D. C. McLennan Timber Cruiser (R. VI-2858)	Ex. 351				
W. J. Lander Timber Cruiser (R. VI-2845)	Ex. 350				
Willis Vitorio Fire Warden (R. VI-3058)	Benton	All	Timber	A. Some	None
B. A. McAllaster Land Com'r (R. IV-1938)					(See Note 1)
J. B. Eddy Tax Agent (R. V-2552)	?	?			

"A"	"B"	"C"	"D"	"E"	"F"
EX-EMPLOYEES.					
Chas. W. Eberlein	Multnomah	?			None (Note 2)
Ex-Land Agent	Clackamas	?			None
(R. V-2228)	Klamath	?			None
David Loring	?	?			(See Note 3)
Ex-Chief Clerk					
(R. V-2187)					
F. A. Elliott	All except	All	Timber	A. 10%	None
Ex-Tmbr Cruiser	Curry,				(Note 4)
(R. VI-2714)	Douglas,		40%—N. G.		
(Deft. Ex. 355)	Jackson		40%—N. G.		
J. D. Zuercher	Douglas	All	Timber	A. 20%	None
Ex-Tmbr Cruiser			A. 1-10%		
(R. VI-2994)					
Roy Woods	Columbia	Some			None
Ex-Tmbr Cruiser	Douglas	Little			None
(R. VI-2870)	Coos	Some			None
	Josephine	Some			
J. T. Gray	Benton	1/2			None
Ex-Fire Warden			3/4 timber	A. 15%	
(R. VI-3119)					

"A"	"B"	"C"	"D"	"E"	"F"
Homer D. Angell Ex-Land Exam. Attorney (R. VI-2764)	Clackamas Polk Marion Multnomah Linn Lane Douglas Josephine Jackson Part of all	? ? ? ? ? ? ? ? ? ?	Timber° Timber° Timber° Timber° Timber° Timber° Timber° Timber° Timber° Timber° Timber		None None None None None None None None None None None
Ben Irwin Ex-Land Exam. (R. VI-2899)				Part—N. G.	
OTHERS.					
A. C. Dixon Lumberman (R. V-2637)	Uncertain		Timber A. 20%	Pasture and farming	
H. W. Scott Farmer-Timber (R. VI-2972)	Washington	4 Twp.	Timber	A. 20%	None

"A"	"B"	"C"	"D"	"E"	"F"
J. F. Nelson Farmer (R. VI-2972)	Clackamas	All	Timber ^o	A. 4%	None
Fred A. Kribs Timberman (R. VI-2909)	Clackamas	?	Timber		None (Note 5)
R. L. Booth Farmer (R. VI-3138)	Yamhill	4 Twp.	Timber ^o	A. 25% G. All	
H. W. Scott Farmer-Timber (R. VI-2972)	Yamhill	4 Twp.	Timber	A. 20%	None
George W. Jones Timberman Official (R. VI-2989)	Yamhill	2 Twp.	Timber	G.	None
W. A. Ball Assessor (R. VI-3228)	Lincoln	All	A. 2000 acres		Some

"A"	"B"	"C"	"D"	"E"	"F"
W. V. Fuller Timber Cruiser Merchant (R. VI-3127)	Polk	5 Twp.	Timber	A. 30%	None
Fred A. Kribs Timberman (R. VI-2909)	Polk	?	Timber		None (Note 5)
H. W. Scott Farmer-Timber (R. VI-2972)	Polk	5 Twp.	Timber	A. 20%	None
H. W. Scott Farmer-Timber (R. VI-2972)	Tillamook	All	Timber	A. 10%	None
Fred A. Kribs Timberman (R. VI-2909)	Multnomah	?	Timber		None (Note 5)
C. H. Stewart Ex-Merchant (R. VI-3007)	Linn	10 Twp.	Timber	A. 50%	Similar lands set- tled

"A"	"B"	"C"	"D"	"E"	"F"
R. A. Booth Lumberman (R. V-2577)	Linn	Part	Timber		
Fred A. Kribs Timberman (R. VI-2909)	Linn	3 Twp.	Timber		None (Note 5)
Fred A. Kribs Timberman (R. VI-2909)	Lane	Part	Timber		None (Note 5)
R. B. Hunt Surveyor (R. VI-3138)	Lane	All	Timber	A. 20% G. 60%	None
R. A. Booth Lumberman (R. V-2577)	Lane	All	Timber	Pasture and farming	If settler would dis- pose of timber
Milford Jacobs Timber Cruiser (R. VI-3178)	Douglas	5 Twp.	Timber ^o	A. 60%	Some

"A"	"B"	"C"	"D"	"E"	"F"
C. M. Stites Timber Cruiser Farmer (R. VI-2878)	Douglas	2 Twp.			None
Irvine Gardner Timber Cruiser (R. VI-3025)	Douglas	31 Twp.	Timber— 95% A. 1%	A. 30%	None (Note 6)
R. A. Booth Lumberman (R. V-2577)	Douglas	Some	Timber		
Fred A. Kribs Timberman (R. VI-2909)	Douglas	10 Twp.	Timber		None (Note 5)
Fred A. Kribs Timberman (R. VI-2909)	Coos	16 Twp.	Timber		None (Note 5)
Milford Jacobs Timber Cruiser (R. VI-3178)	Coos	3 Twp.	Timber	A. 60%	

"A"	"B"	"C"	"D"	"E"	"F"
Dennis McCarthy Timber Cruiser (R. VI-3068)	Coos	All	Timber	A. 5% G. 60%	None
Dennis McCarthy Timber Cruiser (R. VI-3068)	Curry	All	Timber ^o		None
Fred A. Kribs Timberman (R. VI-2909)	Curry	1 Twp.	Timber		None (Note 5)
Fred A. Kribs Timberman (R. VI-2909)	Josephine	?	Timber		None
C. M. Stites Farmer-Timber (R. VI-2878)	Josephine	All	Timber ^o A. 2%		None
W. H. Fallin Dep. Assessor (R. VI-3015)	Josephine	All	A. 5% Timber ^o Barren ^o		

"A"	"B"	"C"	"D"	"E"	"F"
W. R. Whipple Surveyor (R. VI-2934)	Josephine	All	N. G. 85% Timber— 15%		None
Elmer S. Shank Real Estate Lawyer	Josephine	All	Timber— 15%	A. 5%	21½%
R. A. Booth Lumberman (R. V-2577)	Josephine	Part	Timber		
J. F. Kimball Timberman (R. VI-3164)	Jackson	4 Twp.	Timber		Some
C. M. Stites Farmer-Timber (R. VI-2878)	Jackson	6 Twp.	Timber		None
Fred A. Kribs Timberman (R. VI-2909)	Jackson	?			(Note 5)

"A"	"B"	"C"	"D"	"E"	"F"
W. T. Grieve Assessor (R. VI-3199)	Jackson	All	Timber°	A. 12%	None (See Note 7)
Milford Jacobs Timber Cruiser (R. VI-2969)	Klamath	3 Twp.	Timber°	A. 2%	Some
J. F. Kimball Timberman (R. VI-3164)	Klamath	8 Twp.	Timber		None

OTHER MATTERS TESTIFIED TO BY ABOVE WITNESSES.

1. Value of timber from \$1.00 to \$2.50 per thousand feet board measure.
2. Quantity of timber on quarter section from 3,000,000 to 25,000,000.
3. Cost of clearing land for tillage from \$50.00 to \$500.00 per acre.
4. Lands acquired under homesteads in timber area generally abandoned and lands passed to timber companies.
5. If these granted lands had been sold under the terms of the act of April 10, 1869, and act of May 4, 1870, title would have passed to timber companies.

NOTES.

- (1) B. A. McAllaster had no personal knowledge of character of lands (McAllaster, R. IV-2015) ; exhibits attempted to be identified by this witness relating to this subject all under objection.
- (2) Charles W. Eberlein had but slight personal knowledge of the character of any of the granted lands (Eberlein, R. V-2383). His report of May 1, 1908 (Deft. Ex. 309, R. XIII-702), based upon hearsay.
- (3) David Loring in statement to Government representative (Govt. Ex. 116, R. XI-5509), estimated lands suitable for agricultural and horticultural purposes in Douglas, Josephine and Jackson counties at from 60% to 75% of the unsold granted lands.
- (4) F. A. Elliott, in a statement to counsel for Government (Govt. Ex. 122, R. VI-2742), estimated that 50% of the unsold granted lands would be chiefly valuable for growing food stuffs and other farm products.
- (5) Fred A. Kribs attempted to cover, by his testimony, all of the unsold granted lands, but his personal knowledge is shown to be confined to the lands set forth above (Kribs, R. VI-2921, *et seq.*)
- (6) Irvine Gardner, a homesteader within the area of the unsold granted lands, in an affidavit made before a Government officer (Govt. Ex. 117), estimated unsold granted lands suitable for agriculture at one-third and those suited for grazing at two-thirds.

(7) W. T. Grieve, in an affidavit made before an officer (Govt. Ex. 120, R. XI-5526), stated that from 15% to 50% of the quarter sections of unsold granted lands in Jackson County were suitable for settlement. The variation owing to the locality.

APPENDIX E.

WITNESSES FOR GOVERNMENT.

Legend.

- “A” Name of witness called, his occupation, and page of record where his testimony appears.
- “B” County wherein land testified about is located.
- “C” Area within the county covered by testimony of witness.
- “D” Condition of land in natural state.
- “E” Percentage of lands suitable to tillage after they have been cleared.
- “F” Granted lands in present condition suitable to settlement in tracts of a quarter section.

Symbols.

A—Agricultural lands, suitable for tillage.

G—Grazing lands, in addition to agricultural lands.

°—Part.

"A"	"B"	"C"	"D"	"E"	"F"
J. H. Turner Farmer (R. VII-3554)	Clackamas	1 Twp.		A. All	All
John Zeck Ex-Farmer (R. VII-3538)	Clackamas	1 Twp.		Large part tillable	All
W. H. Kandle Farmer (R. VII-3551)	Clackamas	2 Twp.	Timber— Burn	A. 50%	
A. W. Riggs Farmer (R. VII-3560)	Clackamas	1 Twp.	Burn	A. 75%	
C. L. Standing Farmer (R. VII-3465)	Clackamas	4 Twp.		A. 25% up	All

"A"	"B"	"C"	"D"	"E"	"F"
U. S. Dix Farmer (R. VII-3508)	Clackamas	2 Twp.			All
E. E. Quick Ex-Farmer Abstracter (R. VII-3477)	Columbia	All	Timber	A. 70% to 80%	All
Andrew Anderson Farmer (R. VIII-3860)	Columbia	2 Twp.	Timber°	A. 50%	All
T. W. Grant Farmer (R. VIII-3866)	Columbia	1 Twp.		A. 45%— G. 50%	All
D. MacLafferty Cross-Comp. (R. VIII-3908)	Columbia	1 Twp.	Timber	A. 60% to 70%	All
N. H. Martin Ex-Farmer Timber Cruiser (R. VII-3300)	Marion	1 Twp.	Timber	25% of 160 acres	All

"A"	"B"	"B"	"D"	"E"	"F"
C. W. Mariels Stock (R. VIII-3836)	Marion	1 Twp. 2 Twp.		A. 50% A. 40% to 75%	Part All
F. M. Wilkes Ex-Farmer Co. Surveyor (R. VIII-3824)	Benton	4 Twp.	Timber°	A. 50% to 60%	All
R. G. Balderee Cross-Comp. (R. VIII-3833)	Benton	1 Twp.	Timber	A. 65%	All
S. N. Warfield Ex-Farmer Co. Recorder (R. VIII-4152)	Benton	4 Twp.	Little timber	Agricultural	Practically all even sections settled
R. G. Balderee Cross-Comp. (R. VIII-3833)	Polk	1 Twp.	Timber	A. 50%	All
Thos. B. Masters Timberman (R. VIII-4002)	Polk	5 Twp.	Timber— Burn	A. 75%	All

"A"	"B"	"C"	"D"	"E"	"F"
J. N. Switzer Ex-Farmer (R. VIII-4011)	Yamhill	2 Twp.	Timber°	A. 40% to 50%	All
F. J. Steward Farmer (R. VIII-4027)	Yamhill	3 Twp.	Burn	A. 35% to 40%	All
H. S. Maloney Co. Treasurer (R. VIII-4037)	Yamhill	1 Twp.	Tim.-Burn	A. 40% to 50%	Stock
(Affidavit offered to show surprise, stating 90% of 1/4 sections would be taken by settlers)		1 Twp.	Tim.-Burn	Grazing	Every even
		1 Twp.	Tim.-Burn	A. Part G. Part	section taken by settlers
Wm. Brenner Farmer (R. VII-3636)	Linn	4 Twp.	Timber— Burn	A. 90%	No opinion
O. M. Carlson Farmer (R. VII-3758)	Linn	1 Twp.	Timber°	A. 80%	All

"A"	"B"	"C"	"D"	"E"	"F"
C. W. Mariels Stock (R. VIII-3836)	Linn	2 Twp.		A. 50%	All
Jas. F. Wilson Farmer (R. VIII-3934)	Linn	2 Twp.	Timber°	A. 50%	All
William Cochran Farmer (R. VIII-3941)	Linn	3 Twp.	Timber°	A. 80%	All
H. Shelton Farmer (R. VIII-4053)	Linn	4 Twp.	Timber°	A. 75%	All
W. H. Young Farmer (R. VIII-4060)	Linn	3 Twp.	Timber°	A. 65% to 75%	All
N. I. Morrison Ex-Farmer (R. VIII-4068)	Linn	6 Twp.	Timber°	A. 70% to 75%	All

"A"	"B"	"C"	"D"	"E"	"F"
C. E. Clark Farmer-Sawmill (R. VIII-4079)	Linn	4 Twp.	Timber°	A. 40% to 60%	All
Michael Kebelbeck Farmer (R. VII-3245)	Lane	4 Twp.	Timber		All except 2 or 3 sec- tions
N. H. Martin Ex-Farmer Timber Cruiser (R. VII-3300)	Lane (South)	18 Twp.	Timber°	A. 25% to 160 acres	85%
James Whiford Timber (R. VII-3294)	Lane	All		A. 50% G. 50%	All
O. J. Lawrence Cross-Comp. (R. VII-3257)	Lane	3 Twp.	Timber°		All
O. M. Carlson Farmer (R. VII-3758)	Lane	3 Twp.		A. 80%	All

"A"	"B"	"C"	"D"	"E"	"F"
John T. Deadmond Ex-Farmer (R. VII-3768)	Lane	5 Twp.	Timber— Burn	A. 33% to 50%	All
Cal. Hileman Farmer (R. VII-3367)	Lane	3 Twp.		A. 50% G. 50%	All
J. P. Currin Surveyor (R. VII-3389)	Lane	South part		A. 30% to 40% Fruit on rough land	Large ma- jority of land
W. J. Pengra Farmer (R. VII-3442)	Lane	2 Twp.	Timber°	A. 50% G. 50%	Depend on man
W. A. Reene Farmer (R. VII-3449)	Lane	12 Twp.	Timber°		75%
D. P. Caldwell Farmer (R. VII-3501)	Lane	5 Twp.		A. 80%	All

"A"	"B"	"C"	"D"	"E"	"F"
J. E. Kennerly Farmer (R. VII-3788)	Lane	6 Twp.	Timber	A. 33%	All
J. M. Withrow Farmer-Logger (R. VIII-3800)	Lane	8 Twp. 1 Twp.		A. 50% A. 25%	All All
Jas. W. Kinman Farmer (R. VIII-3815)	Lane	2 Twp.		A. 25%	All
R. G. Balderce Cross-Comp. (R. VIII-3833)	Lane	2 Twp. 3 Twp. 1 Twp.	Timber Timber Timber	A. 80% A. 50% A. 70%	All All All
E. C. Lake Cross-Comp. (R. VIII-3835)	Lane	1 Twp.	Timber		All
Chas. M. Collier Surveyor (R. VIII-4621)	Lane	All		A. 50%	75%

"A"	"B"	"C"	"D"	"E"	"F"
N. H. Martin Ex-Farmer Timber Cruiser (R. VII-3300)	Douglas	28 Twp.	Timber°	A. 25% of each 160 acres	85%
W. A. Bogard Ex-Farmer Timber Cruiser Real Estate (R. VII-3659)	Douglas	33 Twp.	Timber° Open°	A. 35%	All
B. F. Shields Ex-Farmer Timber Cruiser (R. VII-3581)	Douglas	50 Twp.	Timber°	A. 25% to 40%	All
Grant Taylor Timber (R. VII-3718)	Douglas	10 Twp.	Timber	A. 50%	33 1-3%
G. E. Keller Farmer (R. VII-3722)	Douglas	4 Twp.	Timber°	A. 66%	50% to 75%

"A"	"B"	"C"	"D"	"E"	"F"
John Neuner Ex-Farmer Timber Cruiser (R. VII-3731)	Douglas	25 Twp.	Timber°	A. 25% to 75%	70% to 75%
H. J. Miller Ex-Farmer (R. VII-3747)	Douglas	7 Twp.	Timber°	30%	All
A. Creason Stock (R. VII-3338)	Douglas	All except N. W.		A. 70% to 80%	All
W. C. Tipton Farmer-Stock (R. VII-3409)	Douglas	18 Twp.	Timber°	A. 75%	65% to 70%
J. L. Boyle Farmer Dep. Assessor (R. VII-3519)	Douglas	5 Twp.	Timber°	A. 50%	All
C. S. Jackson Ex-Farmer Lawyer (R. VIII-4099)	Douglas	1½ lands	Timber°	A. 75% to 80%	All

"A"	"B"	"C"	"D"	"E"	"F"
L. B. Spiker Stock (R. VII-4176)	Douglas	3 Twp.	Timber°	A. 50% to 75%	All
Chas. M. Collier Surveyor (R. VIII-4261) (Ex-Co. Surveyor- City Engineer of Eugene, Ore.)	Douglas	North part		A. 50% G. 50%	75%
W. A. Bogard Ex-Farmer Timber Cruiser (R. VII-3659)	Josephine	8 Twp.	Timber°	A. 35%	All
W. H. Miller Ex-Farmer Merchant (R. VII-3427)	Josephine	8 Twp.		A. 66%	All
George W. Kearns Timberman (R. VIII-3980)	Josephine	All	Timber°	A. 25% to 50%	50%

"A"	"B"	"C"	"D"	"E"	"F"
W. B. Sherman Fruit Raiser Real Estate (R. VIII-4199)	Josephine	All except Forest Reserve	Timber— Brush— Open	A. 50%	75%
M. F. McCown Former Timber Cruiser for Southern Pacific Company (R. VIII-4259)	Josephine	All		25 to 30 acres to 1/4 sec- tion, tilla- ble	
W. R. Lamb Farmer (R. VII-3581)	Jackson	6 Twp.	Timber°	A. 60%	75%
Charles Randles Farmer-Stock (R. VII-3589)	Jackson	5 Twp.	Scattering timber	A. 40%	80%
Chas. A. Edmonson Farmer (R. VII-3611)	Jackson	6 Twp.	Timber— Prairie	A. 50%	75%

"A"	"B"	"C"	"D"	"E"	"F"
W. T. Huston Farmer (R. VII-3623)	Jackson	6 Twp.	Timber°	A. 50%	75%
J. W. Hays Farmer (R. VII-3639)	Jackson	9 Twp.	Scrubby tim- ber	A. 35% to 40%	All
J. W. Kelsoe Farmer (R. VII-3649)	Jackson	2 Twp.		A. 50%	All
W. A. Bogard Ex-Farmer Timber Cruiser (R. VII-3659)	Jackson	1 Twp.		A. 35%	All
James S. Bailey Farmer Land Examiner (R. VII-3688)	Jackson	32 Twp.	Timber°	A. 50%	80%
W. H. Miller Ex-Farmer Merchant (R. VII-3427)	Jackson	12 Twp.		66%	All

"A"	"B"	"C"	"D"	"E"	"F"
C. F. Carter Farmer (R. VII-3496)	Jackson	4 Twp.			All
F. G. McWilliams Real Estate (R. VIII-3908)	Jackson	4 Twp.	Brush	A. 1-3	75%
H. S. Palmerlee Farmer (R. VIII-3926)	Jackson	10 Twp.	Timber ^o	A. 40% to 60%	All
Josiah H. Beeman Ex-Farmer and Miner (R. VIII-3947)	Jackson	All	Some timber	A. 50%	75%
E. J. Mahan Farming unsold granted lands (R. VIII-4132)	Jackson	7 Twp.	Light timber	Agr. All	All
W. B. Sherman Fruit Real Estate (R. VIII-4199)	Jackson	N. W. part		A. 50%	75%

"A"	"B"	"C"	"D"	"E"	"F"
E. J. Grover (R. VIII-4258)	Jackson	6 Twp.	Timber— Prairie	50%	75%
M. F. McCown Former Timber Cruiser for Southern Pacific Company	Jackson	All		25 to 30 acres to each $\frac{1}{4}$ section till- able	75%
(R. VIII-4259) W. A. Bogard Ex-Farmer Timber Cruiser	Coos	15 Twp.	Timber° Open°	A. 35%	All

OTHER MATTERS TESTIFIED TO BY ABOVE WITNESSES.

1. Value of timber on granted lands estimated at from 50 cents to \$1.00 per thousand feet board measure.
2. Best timber in grant sold. Timber light in many places. Many parts of grant open land. Considerable portion of southern portion of grants contain no timber.
3. Very few abandoned homesteads in timbered area of grant.
4. Sale of granted lands in large quantities, to others than actual settlers, and withdrawal of lands from sale, has retarded development and settlement of communities in vicinity of granted lands.

Due and legal service of the within brief is hereby acknowledged and copy received this — day of May, 1914.

Solicitors for Defendants and Appellants Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage (individually and as trustee).

Solicitors for Defendant and Appellant Union Trust Company (individually and as trustee).

Solicitors for Cross-Complainants and Appellants John L. Snyder, et al.

Solicitors for Interveners and Appellants William F. Slaughter, et al.

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